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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-425

DARYL L. McDONALD,
Petitioner,

v.

STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

ALBERT S. RAKAS
1573 Bonita Drive
Akron, Ohio 44313
Attorney for Petitioner

Assistance of:
Kent Legal Defense Fund
P.O. Box 116
Kent, Ohio
Playboy Foundation
Chicago, Illinois

Of Counsel
JEFFREY M. SHAMAN
1235 Ashford Lane
Akron, Ohio 44313

Washington, D.C. • THIEL PRESS • (202) 393-0625

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DARYL L. McDONALD,

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v.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio in the case of *State of Ohio v. Daryl L. McDonald,* entered May 18, 1972, rehearing denied June 15, 1972. That judgment dismissed an appeal from the judgment of the Court of Appeals, Ninth Judicial District of Ohio, entered February 9, 1972, affirming a judgment against Petitioner.

OPINIONS BELOW

The opinion of the Court of Appeals, Ninth Judicial District of Ohio, has not been reported. It is printed as Appendix D hereto. The Supreme Court of Ohio dismissed Petitioner's appeal without opinion (Appendix E).

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JURISDICTION

The Supreme Court of Ohio denied Petitioner's motion for rehearing on June 15, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether Ohio's classification of marijuana with narcotic drugs violates the Petitioner's rights as guaranteed by the Equal Protection and the Due Process Clauses of the Fourteenth Amendment to the United States Constitution when the statutory classification is not based upon some difference that is reasonably related to the purpose of the statute.

2. Whether Ohio's arbitrary classification of marijuana with dangerous narcotic drugs subjects the Petitioner to a discriminatory penalty in violation of the Equal Protection Clause.

3. Whether the Ohio statutory scheme as it relates to marijuana violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution in that it permits a prosecutor the unfettered discretion to charge a defendant with either a misdemeanor or any one of several felonies having a wide range of minimum sentences for the same act committed under the same circumstances.

4. Whether the statutory penalty imposed upon Petitioner which provides for a minimum sentence of ten years imprisonment for the possession of a quantity of marijuana for sale, no matter how small or insignificant an amount, and a minimum sentence of twenty years imprisonment for a single sale of a portion of that

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marijuana is unconstitutionally excessive violating the Eighth Amendment prohibition against cruel and unusual punishment.

5. Whether the Fourth and Fourteenth Amendments require that the defense of entrapment be sustained as a matter of law when police induce an individual to commit a criminal offense before they have probable cause for believing he is engaging in criminal activity.

6. Whether, in light of *United States ex rel. Hall v. Illinois*, 329 F.2d 354 (7th Cir., 1964), and the ineffectiveness of the entrapment defense as now applied to curb improper police encouragement practices, the Due Process Clause requires a reexamination of the doctrine of entrapment as set forth by this Court in *Sorrells v. United States*, 287 U.S. 435 (1932) and *Sherman v. United States*, 356 U.S. 369 (1958), and relied upon by the courts below.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Eighth Amendment to the United States Constitution provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

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The Fourteenth Amendment to the United State Constitution provides in part:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

STATUTORY PROVISIONS INVOLVED

(See Appendix A)

STATEMENT OF THE CASE

On February 10, 1971, Petitioner, Daryl L. McDonald, was found guilty of two counts of unlawful sale of a narcotic drug (marijuana) and one count of unlawful possession for sale of a narcotic drug (also marijuana) in violation of Ohio Revised Code §§3719.20(A) and (B). Sentences were imposed totaling from thirty to sixty years. The Court of Appeals, Ninth Judicial District of Ohio affirmed the judgment and on May 18, 1972, the Supreme Court of Ohio dismissed Petitioner's appeal on the grounds that it raised no substantial constitutional question. Petitioner's motion for rehearing was denied on June 15, 1972, and he subsequently filed this timely writ.

The pertinent facts of Petitioner's case are as follows: On January 9, 1970, detectives of the Akron Police Depart

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ment went to the home of one Wayne Lehman, armed with a warrant to search the premises for marijuana. A search uncovered one marijuana cigarette in the pocket of a dusty jacket hanging upstairs in a closet. Lehman was apparently arrested and taken to a police station in the detectives' vehicle. In the course of this trip Lehman had "conversations" with officers who questioned him as to the source of the marijuana found in his home. Lehman did not tell police where he received the marijuana in his possession. Rather he told them that he had received other marijuana from his brother-in-law, Bob Atwood, and from a person called "Daryl." In fact, Lehman had received marijuana from Atwood but never from the person he knew only as "Daryl." Lehman was unable to provide police with a last name until they produced a picture and told Lehman that it was McDonald. At the time Lehman falsely implicated Petitioner, Lehman was not sure he could make a purchase from petitioner since he had never done so previously, had never talked to Petitioner about marijuana, did not know where Petitioner lived or his telephone number. He only vaguely knew that his brother-in-law had a friend Daryl that he had met several years earlier. Lehman testified that he had mentioned Petitioner's first name because he was "scared," that it "just came out," and that he was "just kind of fishing." He mentioned several other names but was never requested to make any purchases from them. There is no evidence in the trial record that police ever attempted to independently verify the information given them by Lehman. Nor does there appear any evidence besides Lehman's admittedly false statements and the facts of the subsequent offenses themselves to show that Petitioner was in the business of selling marijuana.

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As a result of conversations with the police, Lehman agreed to "cooperate" with detectives and became their agent. Although he was taken to the police station, Lehman was not placed in jail, photographed, fingerprinted, placed on bond, and never appeared in court. In fact, Lehman was never indicted, tried or convicted for any drug offense.

Lehman was subsequently instructed to make a purchase from his brother-in-law, Bob Atwood, which he did. Atwood, too, was never charged, indicted, tried, or convicted for this offense.

Lehman was then instructed to make a purchase from Petitioner. First, Lehman was taken by police to a bar which was allegedly frequented by Petitioner. Lehman was to "accidentally" bump into Petitioner and arrange a sale. This tactic was unsuccessful, however.

Then under police supervision, Lehman telephoned Petitioner's house to arrange a buy but was unable to talk to him at that time. He left a message for Petitioner to call him, but Petitioner never called back. Lehman then called again and again. Petitioner refused at least three times to sell Lehman marijuana, and Lehman later testified that Petitioner as "real reluctant." Lehman did not elaborate at trial the technique he used to overcome this reluctance. Finally, however, Petitioner consented to get some marijuana for Lehman and the transaction was consummated, in a manner suggested by Lehman and under police surveillance. Petitioner was not arrested for this offense.

Approximately three weeks later Lehman was again instructed to make a purchase from Petitoner. No explanation was given why this was necessary nor was a reason given at trial. A sale was consummated, Petitioner was arrested and his car searched and some marijuana found.

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Petitioner was charged with two counts of unlawful sale of a narcotic drug and one count of unlawful possession for sale of a narcotic drug. Prior to trial, the Ohio Legislature enacted a new statute specifically reclassifying marijuana as a hallucinogen. Ohio Revised Code §3719.40 (Effective September 16, 1970). The reclassification of marijuana as a hallucinogen made an individual who without first obtaining a proper license from the State possessed for sale or sold marijuana subject to being imprisoned from one year to five years. Ohio Revised Code §3719.43. While these were the very same acts that the Petitioner committed the prosecutor elected to continue proceeding under the statutes carrying the most severe penalties.

At trial Petitioner contended that the prosecutor's evidence established entrapment as a matter of law. The trial court overruled the motion, finding that police had had some grounds to believe Petitioner was engaged in selling marijuana; that Petitioner had marijuana in his possession at the time of arrest; and that there did not appear that any "particular inducement or promise of monetary gains, appeals to the sympathy or compassion of the defendant were used." The court submitted the issue to the jury and guilty verdicts were returned. Petitioner was sentenced to consecutive twenty to forty years and ten to twenty year sentences, a total of thirty to sixty years in prison for the two sales. Petitioner's motion for new trial was overruled.

The Court of Appeals, Ninth Judicial District, Summit County, Ohio, affirmed the conviction. Using the tests set forth by this Court in *Sorrells v. United States*, 287 U.S. 435 (1932) and *Sherman v. United States*, 356 U.S. 369 (1958), the court found there was "credible evidence" in the record to establish that Petitioner had "predisposition and criminal design."

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On May 18, 1972, the Supreme Court of Ohio dismissed Petitioner's appeal without opinion and denied request for rehearing on June 15, 1972. Petitioner now appeals to this Court from the judgment of May 18 dismissing his appeal as raising no substantial constitutional question.

REASONS FOR GRANTING THE WRIT

I.

OHIO'S SCHEME OF CLASSIFYING MARIJUANA WITH DANGEROUS NARCOTIC DRUGS, A SCHEME WHICH IS UNREASONABLE IN ITS CLASSIFICATION, DISCRIMINATORY IN PENALTIES, AND GRANTS THE PROSECUTOR UNCONTROLLED DISCRETION TO OBTAIN DIFFERENT PENALTIES FOR SIMILAR OFFENSES, POSES SERIOUS AND TIMELY CONSTITUTIONAL QUESTIONS WHICH MUST BE RESOLVED.

A. THE STATUTORY CLASSIFICATION

The legislative classification of marijuana with dangerous narcotic drugs in Ohio is not reasonably related to a valid legislative purpose. It makes no difference whether the argument is grounded in the minimum substantive content of the Due Process Clause,[1] in the overinclusive

[1] The due process clause requires that restrictive legislation be grounded in fact, and where the State's facts have proven inadequate in the face of medical, psychological and sociological evidence to the contrary unreasonable laws acquiesced in by a passive citizenry have been summarily invalidated at the urging of the affected class. Where courts have gone behind the legislative finding of fact, one of three approaches has been used. First, the state has been required by the court to come forward with evidence justifying the statute or its application to the defendant, *e.g., People v. Woody*, 61 Cal.2d 716, 394 P.2d 813 (1964).

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or underinclusive aspects of the Equal Protection Clause, or on an independent limitation on the police power of the state, the contention is the same: the legislative classification is not reasonably related to a valid legislative purpose.

The Ohio statutory scheme which restricts the possession, use, and sale of drugs can be best characterized as an arbitrary and illogical maze of laws which are vague and often times contradictory. This ad hoc attempt by the Ohio Legislature to restrict the use of drugs began in 1927 with the passage of the first statute to restrict marijuana (former General Code of Ohio, §12672; eff. July 31, 1927). Beginning in 1927 and continuing up until 1970, marijuana has been classified as a narcotic. Up until 1955, possession and sale of marijuana were treated the same.[2] Subsequent legislation has not only quadrupled the penalties for sale and possession but also eliminated the distinction between first and subsequent offenses.[3] In addition, the Legislature added the unique

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Second, the courts have recognized outside evidence and scholarship generally available to the public, as the Supreme Court did in *Leary v. United States*, 395 U.S. 6 (1969); *Robinson v. California*, 370 U.S. 660 (1962); and *Brown v. Board of Education*, 347 U.S. 483 (1954). Recently three state supreme courts adopted this approach, although basing their decision at least in part in the overinclusive or underinclusive aspects of the Fourteenth Amendment. *State v. Zornes*, 469 P.2d 552 (Wash., 1970); *People v. McCabe*, 275 N.E.2d 407 (Ill., 1971); and *People v. Sinclair*, 194 N.W.2d 878 (Mich. 1972). In the third category, typified by *Griswold v. Connecticut*, 381 U.S. 479 (1965), the courts have simply concluded that no state of facts could justify legislative abridgement of personal freedoms to the extent or in the manner threatened by the statute.

[2]*See* "Uniform Narcotic Drug Act," (former General Code of Ohio, §§12672-1 to 12672-23, eff. September 5, 1935).

[3]See Appendix B.

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crime of possession of a narcotic for sale[4] while neglecting to add it to the section covering barbiturates. This anomaly continues today.

If the legislative arm is to restrict the use, possession, and sale of drugs, theoretically at least, the sanctions employed should be logically related to the relative dangerousness of the drug in question (although some minor deviation is to be expected). In Ohio, barbiturates and amphetamines have always been singled out for preferential treatment. Despite the fact that barbiturates are inherently more dangerous than marijuana, their possession and sale were treated alike up until 1969. A violation under the barbiturate section was only a misdemeanor for either possession or sale. While a like act committed with marijuana is a felony with mandatory minimum sentences far greater. This gross disparity only goes to show that the classifications employed are not reasonably related to a valid legislative purpose.[5]

In *Spencer v. Sacks*, 173 Ohio St. 419, 183 N.E.2d 363 (1962), the Ohio Supreme Court stated: "In the exercise of its police power, a state may regulate the administration, sale, prescription, possession and use of narcotic drugs." 173 Ohio St. at 420, 182 N.E.2d at 364. Continuing, the Court stated:

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[4]Ohio Revised Code (O.R.C.) §3719.20(A).

[5]In 1970, the Ohio Legislature "reclassified" marijuana as a hallucinogen (Ohio Revised Code §3719.40; eff. September 16, 1970). Marijuana is now classified with such dangerous drugs as lysergic acid diethylamide (LSD), psilocybin, mescaline, peyote "and any other compound, mixture, preparation, or substance which produces hallucinations or illusions when introduced into the body." Ohio Revised Code §3719.40. The effect of this reclassification is procedural, for marijuana is treated the same as when it was classified as a narcotic, save for the first offense of possession (Ohio Revised Code §3719.41).

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The drug as to which Petitioner was indicted and tried was specified as cannabis, commonly known as marijuana. There is *no question* that the state had, under its police power, *the right to classify cannabis as a narcotic drug*. (Emphasis added). 173 Ohio St. at 420, 183 N.E.2d at 364. Cf. *Leary v. United States*, 359 U.S. 6 (1969) and *Brown v. Board of Education*, 347 U.S. 483.

This tacit approval of a classification of marijuana as a narcotic on the strength of the Legislature's imprimature alone has been under attack in recent years. The Supreme Court of Washington in *State v. Zornes*, 469 P.2d 552 (Wash., 1970), recently addressed itself to this very issue. After reviewing many of the scientific treatises on the distinctions between the effects of marijuana and "hard drugs," the Court said:

> The fact that the legislature did, in another act, define it as a 'narcotic drug' did not change its nature and give it properties which it does not possess . . . *It is doubtful whether a legislative declaration contrary to all the evidence can be sustained as constitutional if its effect is to deny to a defendant equal treatment under the law.* [Citing authorities including *Skinner v. Oklahoma*] . . . . (Emphasis added). 469 P.2d at 560.

In *Leary v. United States*, 395 U.S. 6 (1969), this Court stated:

> A statute based upon a legislative declaration of facts is subject to constitutional attack on the grounds that the facts no longer exist; in ruling upon such a challenge a court must, of course, be free to reexamine the factual declaration [citing cases]. *Id.* at 38, fn. 68; see also *Brown v. Borad of Education*, 347 U.S. 483, 494-95 (1954); *Turner v. United States*, 396 U.S. 398, 410-16 (1970).

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Legislation bottomed upon the state's exercise of its police power, even if legitimate when made, is invalid where later events and experience show that it has become arbitrary or unreasonable. *Abie State Bank v. Bryon*, 282 U.S. 765, 772 (1931). Clearly, where the legislation based upon the police power is later shown to be based upon myths and erroneous factual considerations, it is invalid.

In a number of recent cases, the rationality of certain criminal statutes and their sanctions has been examined by the courts in light of modern scientific, psychological and sociological understanding. Where the factual bases or conceptual framework has been found wanting or nonexistent, the statute has been invalidated. *See, e.g. McLaughlin v. Florida*, 379 U.S. 184 (1964); *Robinson v. California*, 370 U.S. 660 (1962); *Easter v. District of Columbia*, 361 F.2d 50 (D.C. Cir., 1966); *Driver v. Hennant*, 356 F.2d 761 (4th Cir., 1966); *see also People v. Sinclair*, 387 Mich. 91, 194 N.W.2d 878 (1972); *People v. McCabe*, 49 Ill. 2d 338, 275 N.E.2d 407 (1971) and *State v. Zornes*, 469 P.2d 552 (1970).

Decisions by three state supreme courts have invalidated their marijuana laws. *See People v. Sinclair, supra; People v. McCabe, supra;* and *State v. Zornes, supra.* Also, in *English v. Miller*, 341 F. Supp. 714 (E.D. Vir., 1972), a federal court invalidated Virginia's classification of marijuana as a narcotic. The Court stated: 'The classification of marijuana as a narcotic is, in this Court's opinion, violative of the equal protection clause of the United States Constitution." 341 F. Supp. at 717-18.

In *People v. McCabe*, it was argued that classifying marijuana under the narcotic drug act rather than under the Drug Abuse Control Act with the stimulant or

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depressant drugs was constitutionally an improper classification, considering the present state of knowledge concerning the comparative nature and effects of the drugs named in the two statutes. The Court agreed with the defendant's contention that there was no rational basis for distinguishing a first sale of marijuana from a first sale of stimulant or depressant drugs under the Drug Abuse Control Act and that the gross disparity between the penalties violated his rights under the Equal Protection Clause. 275 N.E.2d at 408-09.

The plurality decision in *People v. Sinclair* held that the statutory classification of marijuana along with "hard drugs" for purposes of imposition of penalties denied equal protection of the laws. The denial of equal protection of the laws is brought about by the classification of marijuana with hard drugs for it is arbitrary and unreasonable for there exists ample scientific proof that the marijuana is less dangerous than barbiturates, amphetamines and any other hallucinogens. 194 N.W.2d at 881-87. The more persuasive of the Court's findings are:

> Comparison of the effects of marijuana use on both the individual and society with the effects of other drug use demonstrates not only that there is *no rational basis for classifying marijuana with the hard narcotics;* but, also that there is *not even a rational basis for treating marijuana as a more dangerous drug than alcohol.* (Emphasis added). 194 N.W.2d at 881.

> We agree with the Illinois Supreme Court in *People v. McCabe, supra,* that marijuana is improperly classified as a narcotic and hold that M.C.L.A. § 335.31; M.S.A. §18.1121, [almost identical to Ohio Revised Code § 3719.20(A) under which

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> Petitioner was tried and convicted], and its classification of marijuana violates the equal protection clauses of the United States Constitution, Amendment XIV... 194 N.W.2d at 887.

A concurring opinion by Justice Williams found that the Michigan statute classifying marijuana as a narcotic was invalid under either the rational basis test of *Lindsay v. National Carbonic Gas Co.*, 220 U.S. 61 (1911), or compelling governmental interest test of *Shapiro v. Thompson*, 394 U.S. 618 (1969).

As stated by this Court in *McLaughlin v. Florida*,

> Judicial inquiry under the Equal Protection Clause ... does not end with a showing of equal application among members of the class defined by the legislation. The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose.... 379 U.S. at 191.

Stated another way, "[t]he equal protection principal of *Skinner [Skinner v. Oklahoma*, 316 U.S. 535 (1942)] and *McLaughlin* may be stated as follows: the [statutory scheme] must cover all persons or things related to each other logically or scientifically to effectuate the legitimate purpose of the statute."[6] Yet the Ohio statutory scheme can hardly be said to be logical or based on existing scientific factual consideration.

In view of emerging scientific information on the nature of marijuana and the recent decisions of several of the highest state courts and a federal court as well, Petitioner submits that this case raises serious constitutional questions of major import.

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[6] *See*, Note Marijuana Laws: A Need for Reform, 22 Ark. L. Rev. 340 (1968).

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B. DISCRIMINATORY PENALTIES DUE TO THE CLASSIFICATION

As shown above, courts have found that scientific evidence overwhelmingly establishes that statutes similar to the Ohio statute arbitrarily classify marijuana in the same category as dangerous narcotic drugs. The result of this arbitrary classification is to subject the Petitioner to a discriminatory penalty in violation of the Equal Protection Clause.

The Petitioner was sentenced to thirty to sixty years imprisonment composed of ten to twenty years for possession for sale of marijuana, to run consecutively with two concurrent sentences for twenty to forty years for sale of marijuana. These sentences were automatically triggered by the Ohio statute, which sets forth the same mandatory penalties for all of the drugs classified in the dangerous narcotic category. O.R.C. §§ 3719.99(D), (F). Thus, by operation of the automatic sentences attendant upon all drugs in the dangerous narcotic category, the Petitioner was subjected to the same harsh penalties that are imposed upon heroin and cocaine offenses.

In contrast to the Petitioner's sentence, the penalties under the same statute for sale and possession of amphetamines or barbiturates may be a mere fine (no more than $1,000 for both offenses), and even if imprisonment is imposed, the sentences are only one to five years (sale) and no more than one year (possession). O.R.C. §§ 3719.99(I), (J). In fact, no distinction is made between possession and possession for sale of amphetamines or barbiturates, while possession for sale of marijuana carries a sentence which is tenfold that for mere possession of marijuana. Had the Petitioner committed the very same acts but with amphetamines or

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barbiturates instead of marijuana, his penalty, rather than being thirty to sixty years with eligibility for parole in approximately ten years, may have been a fine or, at the most, would have been two to six years with eligibility for parole after one and one-half years.

The same statute, as amended and in effect as the Petitioner's trial began, prohibits the sale without a license of hallucinogens, including marijuana. O.R.C. §3719.42. The penalty for violating this provision is a fine of not more than $10,000 and imprisonment of two to fifteen years. O.R.C. §3719.99(C). So, persons who commit the very same act as the Petitioner of selling marijuana or who sell more dangerous hallucinogens may be prosecuted under this section of the statute and receive a substantially shorter sentence.

Another Ohio statute also makes it a crime to sell or possess "dangerous drugs," including marijuana. O.R.C. §4729.51(C). In stark contradistinction to the Petitioner's sentence, the penalty set forth in this other statute for a first offense of possessing or selling dangerous drugs is merely a fine of not more than $1,000, imprisonment of not more than one year, or both. O.R.C. §4729.99(F). Under this statute, a person who commits the very same act as did the Petitioner may be fined and not imprisoned at all, or, at the most, may be imprisoned for a term many times shorter than the Petitioner's.

Furthermore, in Ohio the penalties for some very serious crimes are considerably less severe than those attendant upon marijuana offenses; for example, the penalty for first degree manslaughter is one to twenty years, for administering poison with intent to kill is two to fifteen years, for illegal abortion that results in death is one to seven years, for forcible rape is three to twenty

years, and for statutory rape is six months to twenty years. So, relative to the penalties for other drug offenses, as well as to other kinds of serious crimes, the Petitioner's sentence is exceedingly discriminatory and severe.

The penalties imposed upon the Petitioner violates the Equal Protection Clause in at least three respects: First, they are much more severe than the penalties for the very same acts (selling and possessing marijuana) in the same statute and in another statute; second, they are much more severe than the penalties for selling or possessing drugs, such as amphetamines and barbiturates, that are much more dangerous than marijuana; and third, they are equally severe as the penalties for selling or possessing for sale narcotic drugs, such as heroin and cocaine, that are much more dangerous than marijuana.

The discriminatory severity of the Petitioner's penalty stands in flagrant contradiction to this Court's decision in *Skinner v. Oklahoma*, 316 U.S. 535 (1942) and *McLaughlin v. Florida*, 379 U.S. 184 (1964). In *Skinner* the Court held that it violated the Equal Protection Clause for a state to sterilize multiple offenders but to exempt offenses arising out of the prohibition laws, the revenue acts, embezzlement, or political offenses. And in *McLaughlin* the Court, relying on *Skinner*, held that it violated the Equal Protection Clause for a state to make cohabitation between unmarried persons a crime if they were of different races, but not if they were of the same race. The Court's decision in both cases were based upon the principle that it is "invidious discrimination" when the state "lays an unequal hand on those who have committed intrinsically the same quality of offense. . . ." 316 U.S. at 541, 379 U.S. at 194. By this standard, the Petitioner's sentence is doubly discriminatory; it is

excessively more severe than the penalty under the same statute and under another statute for the very same offense, and it is excessively more severe than the penalty under the same statute for offenses (sale or possession of amphetamines or barbiturates) that are intrinsically more dangerous than the Petitioner's offense. This is exactly the kind of discriminatory punishment that was held to be unconstitutional in *Skinner* and *McLaughlin*.

A discriminatory penalty such as the Petitioner's that disproportionately inflicts an exceedingly harsh punishment hardly complies with the policy of the Equal Protection Clause, "as reflected in congressional enactments dating to 1870 . . . to subject all persons 'to like punishment, pains, penalties, taxes, licenses, and exactions of very kind, *and to no other*.' R.S. §1977, 42 U.S.C. §1981 (1958 ed.)." *McLaughlin v. Florida*, 379 U.S. 184, 192. (Emphasis added).

It also would seem to be a necessary corollary of *Skinner* and *McLaughlin*, if not a clear mandate of the Equal Protection Clause, that a state may not impose the same penalties upon offenses that are of intrinsically different quality. In other words, a state may not, as Ohio has done here, impose the same sentences for marijuana offenses as for narcotic drug offenses which are intrinsically more dangerous.

As the Court stated in *Skinner*, "the equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn." 316 U.S. at 542. Here, due to the "conspicuously artificial lines" of an overly broad statute, the Petitioner, convicted of a marijuana offense, has been made to suffer the very same harsh penalty that is attendant upon offenses involving extremely more dangerous drugs. This "equal treatment of unequals" constitutes invidious discrimination for which there is no justification.

An application of the *Skinner* case to a situation analogous to the present one was made by the Supreme Court of Washington in *State v. Zornes*, 469 P.2d 552 (1970). There, the Court held that an amendment to that state's drug laws reclassifying marijuana from a narcotic drug to a less dangerous drug must be given retroactive effect, because to do otherwise would be "to deny a defendant equal treatment under the law. See *Skinner v. Oklahoma*...." 469 P.2d at 560. Similarly, in the *Sinclair* case, which held unconstitutional the State of Michigan's classification of marijuana as a narcotic drug rather than a less dangerous drug, Justice Williams (concurring) rested his decision in part on the ground that the classification resulted in a discriminatory penalty. 194 N.W.2d at 894. Both of these opinions uphold what the Petitioner urges here: that the arbitrary classification of marijuana as a dangerous narcotic drug rather than a less dangerous drug results in a discriminatory penalty in violation of the Equal Protection Clause.

Admittedly, the present case does not deal with the penalty of sterilization, as did *Skinner*, or a classification based on race, as did *McLaughlin*. However, those distinctions only concern whether, in judging the state's attempt to justify its discrimination, the courts should apply the "reasonable state interest" standard or the more strict "compelling state interest" standard. It is submitted that the right to be free from discriminatory imprisonment, especially for so long a period as thirty to sixty years, is a fundamental liberty that, like the right to be free from discriminatory sterilization should be judged by the compelling state interest standard. But even if this view is rejected, we cannot overly emphasize that there is no state interest, compelling or reasonable, that can

justify the discriminatory punishment inflicted upon the Petitioner. Speaking to this very point in his concurring opinion in *Sinclair*, Justice Williams said, "Under either of the above standards the classification of marijuana as a 'hard drug' ... constitutes a violation of the Equal Protection Clause...." 194 N.W.2d at 894. The penalty inflicted upon the Petitioner is clearly discriminatory, and cannot be justified under any standard.

C. THE PROSECUTOR'S UNCONTROLLED DISCRETION

To permit a prosecutor the unfettered discretion to pick and choose among various statutes covering the same act and having extreme variance in their penal provision denies equal protection of the law to the individuals involved and can only cause disrespect for law and add to the widespread view among our young people that our laws are hypocritical and do not provide justice.

This Court's decision in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), was based on the principal that it is "invidious discrimination" when the State "lays an unequal hand on those who have committed intrinsically the same quality of offense...." 316 U.S. at 541. Following the rationale in *Skinner*, the Supreme Court of Washington in *State v. Zornes*, 469 P.2d 552 (1970), concluded that a statutory scheme which gives the prosecutor the discretion to charge for either a felony or a misdemeanor for the same act committed under the same circumstances denied the person charged with the felony the equal protection of the laws.[7] 469 P.2d at 563.

[7] As the court stated in *Zornes*: "There is no logical basis for drawing a distinction between an authorization contained in one statute, to charge for either a misdemeanor or a felony, and the same authorization contained in different statutes, if the prosecution under either statute is for the identical act." 469 P.2d at 562.

COPY BOUND

The Court in *Zornes* contended that since marijuana was incorrectly classified as a narcotic in violation of the Equal Protection Clause the subsequent reclassification of marijuana with dangerous drugs in effect reaffirmed what had always been the correct state of the law notwithstanding the statute under which he was prosecuted. Therefore, the Court reasoned that since marijuana never was a narcotic, although the defendant was charged under the narcotic drug sections, he could and should have been charged under the dangerous drug section. The result being that the prosecutor had the discretion of charging the defendant with either a misdemeanor or a felony for the same act committed under the same circumstances thereby denying the defendant the equal protection of the law guaranteed by the Fourteenth Amendment of the United States Constitution. 469 P.2d at 556-64.

In the instant case the Petitioner was charged with possession for sale and sale of a narcotic to wit: marijuana. Subsequent to his arrest but prior to trial the Ohio Legislature reclassified marijuana under the hallucinogen statute. In amending the narcotic section the Legislature specifically exempted marijuana, thus recognizing that which had become common knowledge –namely, that marijuana is not a narcotic. *See* O.R.C. §3719.01(K) (eff. September 16, 1970). As the Court found in *Zornes:* "The fact that the legislature did, in another act, define it as a 'narcotic drug' did not change its nature and give it properties which it does not have." 469 P.2d at 560.

Applying the applicable Ohio law to the instant case, we see that the Ohio statutory scheme violates the Petitioner's right to equal protection of the laws. First, the prosecutor has the unfettered discretion to choose between a felony and a misdemeanor following the

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rationale used in *Zornes*. [Ohio Revised Code § 3719.20(A) v. Ohio Code §4729.51(C) or §3715.52(L)].

Second, if the prosecutor decides that he wants to prosecute a particular defendant for the felonies of possession for sale or sale of marijuana, he still can choose between either the narcotic statutes [O.R.C. §§ 3719.20(A), 3719.20(B)] which carry the draconian penalties of ten to twenty years or twenty to forty years imprisonment, respectively; or he can select either O.R.C. § 3719.42 or § 3719.43 which permits a fine in lieu of a prison sentence or a prison sentence of from two to fifteen years or one to five years, this being substantially less than the minimum that can be meted out under the narcotic or hallucinogen statutes.

The situation described above is in direct contravention of the mandate given by this Court as laid down in *Skinner v. Oklahoma, supra,* and *McLaughlin v. Florida, supra.*

II.

GIVEN THE PRESENT SCIENTIFIC KNOWLEDGE CONCERNING MARIJUANA, THE CONTEMPORARY ATTITUDE OF AMERICAN SOCIETY TOWARDS THE DRUG, AND THE FACT THAT NO OTHER STATE REQUIRES THE EXCESSIVE PENALTIES OF A MINIMUM OF TEN YEARS IMPRISONMENT FOR THE POSSESSION FOR SALE OF MARIJUANA AND A MINIMUM OF TWENTY YEARS IMPRISONMENT FOR A SINGLE SALE OF MARIJUANA, THERE CAN BE NO QUESTION THAT THIS STATUTORY PUNISHMENT IMPOSED ON PETITIONER AND NUMEROUS OTHERS RAISES SERIOUS CONSTITUTIONAL QUESTIONS.

The statutes complained of here, requiring a minimum sentence of ten years for the possession for sale of marijuana and twenty years for a single sale of marijuana, are morally and practically excessive. This fact is recognized by every other state in the Union as the highest minimum penalty outside of Ohio for either offense upon first conviction is five years. It is a fact recognized by the National Commission on Marijuana and Drug Abuse which recommends *maximum* penalties of five years for each offense.[8] And it is an inescapable conclusion based upon the case law surrounding cruel and unusual punishments. Yet Ohio continues to subject its citizens to these punishments. This can no longer be tolerated under the rule of constitutional law. The punishments in question must be declared unconstitutional or many people in the State of Ohio will continue to receive these cruelly excessive punishments.

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[8]Report of the National Commission on Marijuana and Drug Abuse at 151 [hereinafter referred to as *National Report*].

The fact that about 24 million Americans have used marijuana at least once,[9] and the fact that 39 percent of young people between the ages of 18 and 25 have tried marijuana render the words of Justice Williams of the Supreme Court of Michigan in *People v. Sinclair*, 194 N.W.2d 878 (1972), extremely important:

> This is an opinion concerning a problem whose time has come. The name in the entitling is happenstance as the defendant could have been any mother's son or daughter. 194 N.W.2d at 891.

Clearly the constitutional question raised here affects a far greater number of people than the Petitioner in the instant case. The excessive penalties are not only against the interests of the many people whose lives might be ruined by them but also against the interest the state has in maintaining a rational and orderly system of law.

The nature and scope of the prohibition against cruel and unusual punishments is not easily ascertained. There is the inherent difficulty in that "The Cruel and Unusual Punishments Clause, like other great clauses of the Constitution, is not susceptible to precise definition." *Furman v. Georgia*, 92 S. Ct. 2726, 2736 (1972) (Brennan, J. concurring). In fact, ". . . of all our fundamental guarantees, the ban on 'cruel and unusual punishments' is one of the most difficult to translate into judicially manageable terms," 92 S.Ct. at 2797 (Burger, C.J., dissenting). Nevertheless, since the landmark case of *Weems v. United States*, 217 U.S. 349 (1910), the standards that have been developed by this Court leave no doubt that the punishment imposed in the case at bar falls well within the ban of the Eighth Amendment.

The most important and consistently articulated fact in relation to a definition of what constitutes a cruel and unusual punishment is that the "amendment must draw

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[9] *National Report, supra* note 8 at 32.

its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). The "cruel and unusual punishment clause [is] not a static concept, but one that must be continually reexamined in the light of contemporary human knowledge." *Furman*, 92 S.Ct. at 2772. (Marshall, J. concurring). *See also Robinson v. California*, 370 U.S. 660, 666 (1962). "Thus, a penalty which was permissible at one time in our Nation's history is not necessarily permissible today." *Furman*, 92 S.Ct. at 2772 (Marshall, J. concurring).

A major principal that emerges from *Weems* is that the Eighth Amendment is directed, "not only against punishments which inflict torture, but against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged." 217 U.S. at 371. The importance of this fact in relation to the case at bar is crucial, since the fatal infirmity of the punishment Petitioner faces is that it is *excessive in length.* The problem then is to determine what standards are established that clearly point out that this punishment is *unconstitutionally excessive.*

It is important to note that the punishment cannot be viewed in an abstract sense. In *Robinson v. State of California*, the court struck down a punishment of imprisonment for ninety days and remarked "To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract." 370 U.S. at 667. The point being that a punishment must be considered in light of the gravity of the offense and with an eye towards "evolving standards of decency."

While the court has discussed a variety of standards that might be applied to a particular case in order to determine whether the punishment is cruel and unusual there are three well-established tests that can be applied to the present case. The first is whether the sentence is unusually severe and greatly disproportionate to the offense. *See Furman v. Georgia, supra* at 2748 (Brennan, J. concurring) and 2770 (Marshall, J. concurring); *Weems v. United States, supra* at 371; and *O'Neil v. Vermont*, 144 U.S. 323, 340 (1892) (Field, J. dissenting). The second test applicable here is whether the punishment "is substantially rejected by contemporary society." *Furman, supra* at 2748 (Brennan, J. concurring) and at 2774 (Marshall, J. concurring). The final test being whether or not the punishment serves the "penal purpose more effectively than some less severe punishment." *Furman*, 92 S.Ct. at 2748, 2773; *Weems*, 217 U.S. at 381.

The penalty in this case is unusually severe in relation to the offense itself and by also looking at the penalties authorized for other more serious offenses. The offense (possession and sale of marijuana) involves the use and sale of a relatively harmless drug that is used by large number of American citizens. As mentioned above, a survey of the National Commission on Marijuana and Drug Abuse indicates that about 24 million Americans have used marijuana at least once.[10] The fact that the drug is relatively harmless has been documented in numerous medical reports over the past few years and is summarized very well in the above mentioned report.[11]

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[10] *National Report, supra* note 8 at 32.

[11] *National Report* at 49-66. *See also* L. Grinspoon, Marijuana Reconsidered (Bantam ed., 1971); J. Kaplan, Marijuana: The New Prohibition (1971).

There is a growing consensus that the use of marijuana is not the danger it was once perceived to be. To sentence one to a minimum term of twenty years for a single sale of marijuana or a minimum term of ten years for possession for sale is clearly on its face cruel and unusual. To further elaborate, the contrast between this minimum penalty and the minimum penalties established for serious crimes of violence in Ohio clearly show that the punishment in this case is excessive.

For the crime of voluntary manslaughter the minimum penalty in Ohio is one year (the maximum for this crime is twenty years). O.R.C. § 2901.06; Robbery by force or violence, minimum penalty: three years; O.R.C. § 2901.12; Maiming or disfiguring another, minimum sentence: three years, O.R.C. § 2901.19; Assault with the intent to kill, or commit rape or robbery, minimum sentence: three years, O.R.C. § 2901.24; Rape, minimum sentence: three years (maximum twenty years), O.R.C. § 2905.01; Rape of female under fourteen, minimum sentence: five years (maximum twenty years), O.R.C. § 2905.031. That the minimum punishments for these serious crimes of violence range from one to five years of imprisonment points out beyond a doubt that a minimum sentence of twenty years for a single sale of marijuana raises serious questions under the Eighth Amendment. The following quote from *Weems* is clearly applicable:

> And this contrast shows more than different exercises of legislative judgment it is greater than that. It condemns the sentence in this case as cruel and unusual. It exhibits a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice. The State thereby suffers nothing and

> loses no power. The purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting, severity, its repetition is prevented and hope is given for the reformation of the criminal. *Weems v. United States,* 217 U.S. at 381.

That a minimum sentence of twenty years for a single sale of marijuana and a minimum sentence of ten years for possession for sale is substantially rejected by contemporary society can be shown by a look at similar penalties in other jurisdictions. This approach has been sanctioned by the Court. "For example, *Weems v. United States,* 217 U.S. at 380, 30 S.Ct. at 554 and *Trop v. Dulles,* 356 U.S. at 102-03, 78 S.Ct. at 598-99, suggest that one factor that may be considered is the existence of the punishment in jurisdictions other than those before the Court." *Furman,* 92 S.Ct. at 2746 (Brennan, J. concurring). No other state in the United States has a minimum penalty of twenty years for the first conviction of a single sale of marijuana nor does any other state provide for a minimum penalty of ten years for possession for sale. In fact, forty states have a minimum penalty of one year or less for the first offense of sale of marijuana while the penalties for possession for sale are usually even less severe in jurisdictions that have such an offense.[12] At one time, one other state had a minimum penalty of twenty years for the sale of marijuana, the State of Michigan. Since that time, however, the Supreme Court of Michigan has declared that penalty "*Cruel and Unusual.*" *People v. Lorentzen,* 387 Mich. 167, 194

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[12] These statutes are compiled by The National Organization for the Reform of Marijuana Laws in *The Criminal Penalties Under the Current Marijuana Laws* (1972). Earlier statistics compiled by this organization are published at 9 Cr. L. 2440 (1969).

N.W.2d 828 (1972). Today the minimum penalty in Michigan for the offense is zero years and the *maximum* penalty is four years. Thus, the *minimum* penalty complained of in the present case is five times greater than the current maximum penalty in Michigan.[13]

Further evidence that excessive penalties involving marijuana are rejected by contemporary society is the fact that the State of California has placed the legalization of the use of marijuana on its November ballot (Proposition 19 on the ballot). Also, the House of Delegates at the 1972 American Bar Association Convention passed a resolution decrying harsh penalties for the use of marijuana.[14] While deploring the use of marijuana, the delegates resolved:

> That, because the individual and social costs resulting from some existing laws punishing personal use or simple possession of marijuana substantially outweigh any benefits derived, federal, state, and local laws should be overhauled and present excessive criminal penalties should be eliminated.

It is equally clear that the penalty involved in the present case does not "serve any penal purpose more effectively than some less severe punishment." Indeed, even if this were not obvious from the fact that no other state needs to punish its marijuana offenders in such a severe manner, it is obvious from looking to the avowed purpose of the Ohio marijuana laws:

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[13] The Ohio Supreme Court has rejected the argument that the minimum penalty of twenty years imprisonment for the sale of marijuana was "cruel and unusual." *State v. Chaffin*, 30 Ohio St.2d 13 (1972). The Court erroneously applied the historical interpretation of the Eighth Amendment, an interpretation rejected by *Weems*. This point is clarified in *Furman*, 92 S. Ct. at 2740.

[14] Official minutes are yet to be published.

> To prevent drug abuse by young persons by *instructing them in its evils*, to revise and expand existing drug laws, *to meet changing patterns of drug abuse*, and to provide for the *treatment* and *rehabilitation* of drug dependent persons. (Emphasis added). 133 V.H. 874, p. 2730, eff. September 16, 1970.

The avowed goal of rehabilitation cannot be achieved by the use of long sentences. A minimum sentence of twenty years is not conducive to rehabilitation, as the *Final Report of The Ohio Citizens' Task Force on Corrections* correctly points out in regards to the "assumption that long sentences further the correctional rehabilitation of offenders:"

> This is a patently false assumption. Most of Ohio's correctional administrators agree that: (a) sentences are generally too long, and (b) many inmates derive the maximum benefit of incarceration during the first few years and often tend to go 'downhill' in their behavior and attitudes after that, with resultant hostility and increased potential for further crime after release. *Long sentences are self-defeating.* At A-2, A-3. (Emphasis added).

The long sentences in the present case clearly do not serve the purpose intended by Ohio drug laws. That other lesser sentences will effectively serve the penal purpose of Ohio's drug laws is also obvious from the fact that Ohio has other statutes for the same offense that require a lesser punishment. As the penal purposes involved are served by these lesser punishments then clearly the punishments in question here are rendered "cruel and unusual."

The tests discussed above point out that the punishments imposed upon Petitioner are "cruel and unusual." However, the arbitrary and selective manner in which the punishment is applied also cannot be overlooked.

> There is increasing recognition of the fact that the basic theme of equal protection is implicit in cruel and unusual punishments. *Furman*, 92 S.Ct. at 2732 (Douglas, J. concurring).

Lack of such equal protection can readily be seen in the fact that prosecutors in Ohio have the unfettered discretion to apply any of a variety of statutes with a subsequent variety of punishments for the act of selling or possession for sale of marijuana. Arguments as to this aspect of the problem have previously been made.

Clearly the issues discussed above involve the lives of many people in the State of Ohio. They present grave constitutional issues that should be heard and put to rest.

III.

THIS CASE RAISES IMPORTANT ISSUES OF PUBLIC POLICY AND SIGNIFICANT CONSTITUTIONAL QUESTIONS CONCERNING THE APPLICATION OF THE ENTRAPMENT DEFENSE AS A LIMITATION ON POLICE PRACTICES OF ENCOURAGEMENT.

Police encouragement of criminal offenses is not an isolated phenomenon, but rather "a very pervasive practice used throughout the country by all levels of enforcement agencies."[15] In recent years there has been wide use of informants and *agents provocateurs*[16] and the use of encouragement techniques has become an

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[15] Rotenberg, The Police Detection Practice of Encouragement: *Lewis v. United States* and Beyond, 4 Hous. L. Rev. 609, 629 (1967).

[16] *See* Donnelly, Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs, 60 Yale L. J. 1091, 1093 (1951).

common practice to law enforcement agencies, particularly in narcotics cases.[17] With this practice has come increased dangers to the individual. In *Osborn v. United States*, 385 U.S. 340 (1966), Justice Douglas noted that

> We are rapidly entering the age of no privacy, where everyone is open to surveillance at all times; where there are no secrets from the government. The aggressive breaches of privacy by the Government increase by geometric proportions. 385 U.S. at 341. (Dissenting opinion).

Continuing, he found that there was an

> . . . alarming trend whereby the privacy and dignity of our citizens is being whittled away by sometimes imperceptible steps.
>
> Entrapment is merely a facet of a much broader problem. Together with illegal searches and seizures, coerced confessions, wiretapping, and bugging, it represents lawless invasion of privacy. It is indicative of a philosophy that the ends justify the means. 385 U.S. at 343.

While this Court has actively placed limitations on police conduct in such areas as search and seizure, illegal detention, wiretapping, third degree practices, confessions and interrogations, and lineups, little attention has been focused on the problem of encouragement practices used by state law enforcement officers. Police have been free to induce the commission of criminal offenses without any well-defined constitutional limitations on their conduct.

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[17] Tiffany, McIntyre, and Rotenberg, Detection of Crime: Stopping and Questioning, Search and Seizure, Encouragement and Entrapment at 210 (1967).

In *Lewis v. United States*, 385 U.S. 206 (1966), Chief Justice Warren, after noting that the Government was entitled to use decoys and conceal the identity of its agents, found that

> The various protections of the Bill of Rights, of course, provide checks upon such official deception for the protections of the individual. 385 U.S. at 209.

The nature and extent of these checks upon official deception remain open to question, however.

(A) Do the Fourth and Fourteenth Amendments require that probable cause exist before an individual is induced to commit a criminal offense?

When the police encourage, they are "searching" for a crime and doing so without proper grounds is an improper interference with a person's right to be free from unreasonable searches and seizures of the person. Indeed, for the state to search out a person without good grounds for the purpose of getting him to commit a crime would seem more objectionable than for the state without good grounds to search and seize a person's property to be used as evidence of crime.[18]

In *Terry v. Ohio*, 392 U.S. 1 (1968), this Court clearly indicated that the contours of the Fourth Amendment are not restricted by the technical notion of search and seizure. Chief Justice Warren found that the central inquiry under the Fourth Amendment was

> . . . the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security. 392 U.S. at 19.

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[18] Rotenberg, The Police Detection Practice of Encouragement: *Lewis v. United States* and Beyond, 4 Hous. L. Rev. 609, 618 (1967).

No valuable state interest is served by permitting police to unrestrictedly solicit the commission of criminal offenses,[19] and such police activity invades personal security as much as the conventional search for the fruits of crime. An initial limitation on police conduct would be to require probable cause for believing that the solicitee is engaged in criminal activity.[20] In *People v. Toler*, 26 Ill.2d 100, 185 N.E.2d 874 (1962), *cert. denied* 374 U.S. 813, the Supreme Court of Illinois held that since the defense of entrapment concerns essentially the propriety of police conduct, when the evidence was devoid of any suggestions that the defendant was under investigation or had possessed marijuana for sale or sold marijuana before the solicitations, it was error for the court not to hold that there was entrapment as a matter of law.

The Fourth Amendment's associated right to privacy also raises the question of whether probable cause must exist to justify the solicitation of a criminal offense.

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), this court recognized that a zone of privacy was created by several fundamental constitutional guarantees. The Fourth and Fifth Amendments provide protection against all governmental invasion of the sanctity of a man's home and the privacies of life. *Boyd v. United States*, 116 U.S. 616 (1886). The Fourth Amendment has been held to create a right of privacy, no less important than any other right carefully and particularly reserved to the people. *Mapp v. Ohio*, 367 U.S. 643 (1961).

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[19] Comment, The Serpent Beguiled Me and I Did Eat, The Constitutional Status of the Entrapment Defense, 74 Yale L. J. 942, 945 (1965).

[20] *Id.* at 944.

> As Justice Fortas put it in language readily applicable to encouragement, the right of privacy 'is, simply stated, the right to be let alone; to live one's life as one chooses, free from assault, intrusion or invasion except as they can be justified by the clear needs of community living under a government of law.' [21]

Unlimited solicitation, like unlimited search and seizure, serves no legitimate state interest and threatens the basic freedom of the individual. Thus, effective control of solicitation requires that police be subject to constitutional limitations; that police demonstrate probable cause to believe a person is about to commit a criminal offense before solicitation is permitted.

Petitioner's case fairly raises the Fourth Amendment issue since the police solicited him solely on the basis of an admittedly false tip by an informant, himself under arrest for a narcotics violation. The circumstances disclosed clearly do not meet the standards of probable cause as set forth in *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 394 U.S. 410 (1969).

(B) Petitioner's case also poses the important question of whether the Due Process Clause requires a reconsideration of the doctrine of entrapment as set forth in *Sorrells v. United States*, 287 U.S. 435 (1932) and *Sherman v. United States*, 356 U.S. 369 (1968), relied upon by the courts below.

In *Sorrells* and *Sherman* this Court established the so-called "origin-of-intent" test. The controlling question in entrapment cases was (and still is) "whether the

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[21] Rotenberg, *supra* note 15 at 618.

defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials." 287 U.S. at 451. The key issue was the predisposition and criminal design of the defendant. The defendant asserting the entrapment defense was subject to "an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue." 287 U.S. at 451.

The "origin-of-intent" test was based on an interpretation of congressional intent in enacting criminal statutes. As Chief Justice Warren concluded in *Sherman*,

> Congress could not have intended that its statutes were to be enforced by tempting innocent person into violations. 356 U.S. at 372.

Thus, the central issue under the *Sorrells-Sherman* approach became whether the victim of inducement was criminally predisposed or innocent, not whether the methods used by police were violative of any standards required by due process of law.

In *United States ex rel. Hall v. Illinois*, 329 F.2d 354 (7th Cir., 1964), the court recognized that the states had a "constitutional obligation to prevent the prostitution of state judicial power through lawless enforcement of the criminal law." 329 F.2d at 359. The court, however, denied a writ of habeas corpus to reexamine the application of the entrapment defense by the Illinois courts, holding that the recognition of the defense alone was sufficient for the requirements of due process. Nevertheless, it would seem that where the test for application of the defense is such that the effectiveness of the defense is virtually eliminated, due process is violated by the state. It seems obvious that states cannot do by

indirection, i.e., judicial interpretations and holdings, that which they are prohibited from doing directly—abolishment of the entrapment defense.[22]

The *Sorrells-Sherman* approach has permitted the virtual abolishment of entrapment as an effective defense in state courts and thus presents serious due process questions.[23] First, by focusing on the intent of the accused, his prior criminality or lack of it, the *Sorrells-Sherman* approach disregards its basic purpose –the deterrence of improper police methods. The very commission of act itself is often sufficient to supply the necessary "predisposition" to negate the defense. In the instant case, for example, no evidence that Petitioner intended to sell marijuana existed when police made the first inducement and purchase. Yet the court found no difficulty in finding the requisite intent. Under the current test, police are free to use any methods to solicit the commission of a criminal offense since the fruits of the inducement can in turn be used to justify it.[24] This is contrary to the accepted constitutional principle that the fruits of unlawful police practices cannot be used to justify that conduct. *Johnson v. United States,* 333 U.S. 10 (1948); *Brinegar v. United States,* 338 U.S. 160 (1949). In short, any test which focuses on the intent of

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[22] Note, Due Process of Law and the Entrapment Defense, 1964 Ill. L. F. 821, 827.

[23] "Both as a standard for police detection practices and as a control device, entrapment has been ineffectual." Rotenberg, *supra* note 15 at 631.

[24] *See* Comment, The Serpent Beguiled Me and I Did Eat, The Constitutional Status of the Entrapment Defense, 74 Yale L. J. 942, 945 (1965).

the victim cannot effectively protect the accused against unlimited solicitation of criminal offenses.[25]

The ineffectiveness of the entrapment defense has also been facilitated by the vague contours of the *Sorrells-Sherman* approach, which has lead to uneven application of the defense in the lower courts. Professor Mikell has found that

> On the differences in meaning given by judges and juries to these characterizations of the overtures made by the officer to the defendant, it comes about that on practically identical operative facts the defense is held valid in one case and denied in another, and the defendant held to be a criminal or an 'innocent victim.'[26]

Orfield has found that the entrapment defense continues "to suffer from the absence of a cohesive theoretical basis,"[27] and a recent court decision finds that there "does not appear to be any single, well-recognized and consistent rationale for the entrapment defense." *United States v. Chisum,* 312 F. Supp. 1307 (C.D. Calif., 1970).

By 1957 four Supreme Court Justices were willing to characterize the current entrapment doctrines as "gropingly . . . express[ing] the feeling of outrage at conduct of law enforcers . . . but without the formulated basis in reason that is the first duty of the courts to

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[25] Sherrill, The Defense of Entrapment: A Plea for Constitutional Standards, 20 U. Fla. L. Rev. 63, 79 (1967).

[26] The Doctrine of Entrapment in the Federal Courts, 90 U. Pa. L. Rev. 245, 249 (1942).

[27] "The Defense of Entrapment in the Federal Courts," 1967 Duke L. J. 39, 71.

construct. . . ." *Sherman v. United States*, 356 U.S. 369, 378 (1958) (Concurring opinion).[28]

As a result,

> The defense of entrapment, as commonly defined, does not substantially restrict police freedom to develop encouragement practices.[29]

Recognizing due process as the basis of entrapment would give the doctrine constitutional significance and end the sheer fiction of *Sorrell's* statutory interpretation.[30]

This Court's reconsideration of the *Sorrells-Sherman* approach is essential to resolve the confusion in the lower courts and to determine if the entrapment defense rests on constitutional considerations imposing restraints on both federal and state law enforcement techniques. This Court cannot establish a policy of allowing encouragement without regard to the problems which arise in the application of that policy.[31] Neither can this Court permit the continued use of a test which can and has been applied by other courts in such a manner as to destroy the effectiveness of the entrapment defense as a limitation on police practices.

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[28] Comment, The Serpent Beguiled Me and I Did Eat, The Constitutional Status of the Entrapment Defense, 74 Yale L. J. 942, 943 fn. 3 (1965).

[29] Tiffany, McIntyre and Rotenberg, Detection of Crime: Stopping and Questioning, Search and Seizure, Encouragement and Entrapment at 267 (1967).

[30] Cowen, The Entrapment Doctrine in the Federal Courts, and Some State Court Comparisons, 49 J. Crim. L., C. & P.S. 447, 449 (1959).

[31] *See* Rotenberg, *supra* note 15 at 616.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of Ohio.

Respectfully submitted,

ALBERT S. RAKAS
1573 Bonita Drive
Akron, Ohio 44313
Counsel for Petitioner

APPENDIX A

STATUTES INVOLVED

The pertinent Ohio statutes read in part:

[ADULTERATION AND MISBRANDING]

§3715.52 Prohibitions.

The following acts and the causing thereof are hereby prohibited:

(L) The sale, offering for sale, giving away, or delivery at retail or to the consumer without a prescription from a physician, veterinarian, or dentist of any drug which under federal or Ohio law can be sold only on prescription; * * *.

§3715.99 Penalties.

(A) Whoever violates sections 3715.01 and 3715.52 to 3715.71, inclusive, of the Revised Code shall be fined not less than one hundred nor more than three hundred dollars for a first offense; for each subsequent offense such person shall be fined not less than three hundred nor more than five hundred dollars or imprisoned not less than thirty nor more than one hundred days, or both.

[UNIFORM NARCOTIC DRUG ACT]

§3719.01 Definitions.

As used in sections 3719.01 to 3719.22, inclusive, of the Revised Code:

(K) "Narcotic drugs" means coca leaves, opium, isonipecaine, amidone, isoamidone, ketobemidone, and every substance not chemically distinguishable from them and every drug, other than cannabis, to which the federal laws relating to narcotic drugs may apply.

§3719.20 Prohibitions.

No person shall:

(A) Possess for sale a narcotic drug except in accordance with the provisions of sections 3719.01 to 3719.22, inclusive, of the Revised Code;

(B) Sell a narcotic drug except in accordance with the provisions of sections 3719.01 to 3719.22, inclusive, of the Revised Code; * * *.

§3719.40 Hallucinogen defined.

As used in sections 3719.41 to 3719.49, inclusive, of the Revised Code, "hallucinogen" means lysergic acid diethylamide, commonly known as LSD., N-N-dimethyltryptamine, commonly known as DMT., cannabis, commonly known as marijuana, hashish, ganja, or bhang, psilocybin, mescaline, peyote, bufotenin, epena, parica, ayahuasca, yage, caapi, amanita, muscaria, and any other compound, mixture, preparation, or substance which produces hallucinations or illusions when introduced into the body.

As used in this section, "cannabis" includes all parts of the plant cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin; and tetrahydrocannabinol; but does not include the mature stocks of such plant; fiber produced from such stalks, oil, or cake from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stocks except the resin extracted therefrom, fiber, oil or cake, or the sterilized seed of such plant which is incapable of germination.

§3719.41 Purchase, use of, possession or control of, prohibited; exceptions.

No person shall, with intent to produce hallucinations or illusions, purchase, use, possess, or have under his control an hallucinogen. Possession or control of any hallucinogen specifically named in section 3719.40 of the Revised Code constitutes prima-facie evidence of a violation of this section, except that this section does not apply to the use, possession, or control of any hallucinogen by licensed manufacturers, wholesalers, pharmacists, owners of pharmacies, physicians, and other persons, for research, clinical, or medicinal purposes authorized by federal law or any rules or regulations adopted pursuant thereto.

§3719.42 License for manufacture.

No person shall, for the purpose of producing hallucinations, or illusions, or knowing an hallucinogen will be used for such purpose, manufacture, produce, cultivate, grow, prepare, sell, offer for sale, barter, give away, or dispense an hallucinogen, or knowingly permit the same to be done on land owned, occupied, or controlled by him, without first obtaining a license as a manufacturer of hallucinogens from the state board of pharmacy. The manufacture, production, cultivation, growing, preparation, selling, offering for sale, bartering, giving away, or dispensing of any hallucinogen specifically named in section 3719.40 of the Revised Code constitutes prima-facie evidence of a violation of this section.

§3719.43 Wholesaler's license required.

No person except a licensed pharmacist or owner of a pharmacy, or a manufacturer licensed under section 3719.42 of the Revised Code shall possess for sale, or sell, barter, exchange, dispense, give away, or make offer therefor, any hallucinogen without obtaining a license as a wholesaler of hallucinogens from the state board of pharmacy.

§3719.99 Penalties.

(C) Whoever violates section 3719.09, or 3719.101 [3719.10.1], division (I), (J), or (K) of section 3719.20, section 3719.42, division (A) of section 3719.44, or section 3719.47 of the Revised Code shall be fined not more than ten thousand dollars and imprisoned not less than two nor more than fifteen years for a first offense; for a second offense such person shall be fined not more than ten thousand dollars and imprisoned not less than five nor more than twenty years; for a third offense and each subsequent offense thereafter such person shall be fined not more than ten thousand dollars and imprisoned not less than ten nor more than thirty years.

(D) Whoever violates division (A) or (H) of section 3719.20 or division (B) of section 3719.44 of the Revised Code shall be imprisoned not less than ten nor more than twenty years for a first offense; for a second offense such person shall be imprisoned not less than fifteen nor more than thirty years; for a third offense such person shall be imprisoned not less than twenty nor more than forty years.

(F) Whoever violates division (B) of section 3719.20 or division (D) of section 3719.44 of the Revised Code shall be imprisoned not less than twenty nor more than forty years.

(I) Whoever violates division (D) of section 3719.24 of the Revised Code shall be fined not more than one thousand dollars or imprisoned not more than one year, or both, for a first offense; for each subsequent offense such person shall be fined not more than one thousand dollars or imprisoned not more than ten years, or both.

(J) Whoever violates division (A), (B), (C), (E), (F), (G), or (H) of section 3719.24 of the Revised Code shall be fined not more than one thousand dollars or imprisoned not less than one nor more than five years, or both, for a first offense; for each subsequent offense such person shall be fined not more than five thousand dollars or imprisoned not less than two nor more than twenty years, or both.

§4729.51 Persons who may sell, deliver, distribute and possess dangerous drugs.

(C) No person, except a licensed terminal distributor of dangerous drugs or a practitioner shall purchase for the purpose of resale, possess for sale, or sell, at retail, dangerous drugs.

The possession by any person, other than a practitioner, registered wholesale distributor of dangerous drugs, or licensed terminal distributor of dangerous drugs of any dangerous drugs other than insulin, except those drugs obtained lawfully for medical purposes from or upon the prescription of a practitioner shall constitute presumptive evidence that such person is in violation of this division, provided, that a person may lawfully possess or use dangerous drugs pursuant to section 4729.51 of the Revised Code or otherwise as specifically provided by law.

§4729.99 Penalties.

(F) Whoever violates division (C) of section 4729.51 or section 4729.61 of the Revised Code shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both, for a first offense; for each subsequent offense such person shall be fined not more than one thousand dollars and imprisoned not less than one nor more than ten years.

APPENDIX B

A SUMMARY OF OHIO LAWS RELATING TO THE USE OF MARIJUANA

1927

The Ohio Legislature included marijuana for the first time (designated "marijuana, canabis, and cannabis sativa") with other "habit forming drugs" which then included cocaine, opium, morphine and any of its derivities, i.e., heroin, and any other substance which induced a craving for said drugs. (Former General Code of Ohio, §12672; eff. July 31, 1927). Possession and sale were punishable by a fine of not less than $50 nor more than $500 for the first offense. For a subsequent offense, possession and sale were punishable by a fine of not less than $100 nor more than $500 and/or imprisonment not less than 1 year nor more than 5 years. (*Id*, §12672).

1935

In 1935, the General Assembly repealed the 1927 law, and adopted instead the "Uniform Narcotic Drug Act." (Former General Code of Ohio, §§ 12672-1 to 12672-23; eff. September 5, 1935; this Act was later included in Chapter 37 of the Ohio Revised Code. See, for example, § 3719.01 of the Ohio Revised Code, 1953).

Marijuana ("cannabis") was defined as a "narcotic drug" together with opium, heroin, codeine, morphine, and coca leaves "and every substance not chemically distinguishable from them" [*Id.*, §12672-1(12a), (13), Ohio General Code, 1935]. The penalties for possession and sale were:

First Offense: Imprisonment in the Penitentiary not exceeding five years, or a fine not exceeding $500, or both;

Subsequent Offense: Imprisonment in the Penitentiary for a term not exceeding five years, or a fine not exceeding $1,000, or both.

1955

In 1955, the 1935 Act (General Code, §§ 2672-1 to 12762-23), which was renumbered in 1953 (Ohio Revised Code § 3719.01 to § 3719.22), was replaced by the Ohio Legislature with a revised Uniform Narcotic Drug Act. (Chapter 3719, §§ 3719.01 to 3719.22, Ohio Revised Code, 1955). This Act, as amended from time to time, was still in effect at the time of the Petitioner's arrest. It defined marijuana as a "narcotic drug," together with heroin, morphine, codeine, opium, and other substances. The following penalties were provided for unlawful possession, possession for sale (which was added specifically in the new act and which continues today), and sale [§ 3719.99]; they were the penalties at the time of Petitioner's arrest:

Possession (§ 3719.09)

First Offense: Imprisonment in the Penitenttiary from 2 to 15 years or a fine not to exceed $10,000, or both;

Second Offense: Imprisonment in the Penitentiary from 5 to 20 years or a fine not to exceed $10,000, or both.

Subsequent Offense: Imprisonment in the Penitentiary from 10 to 30 years or a fine not to exceed $10,000, or both.

Possession for Sale [§ 3719.20(A)]

There is no distinction made between whether the violation is a first offense or a subsequent offense. The penalty imposed is imprisonment in the Penitentiary for not less than 10 years nor more than 20 years.

Sale [§ 3719.20(B)]

As is the case in a violation for possession for sale [§ 3719.20(A)], no distinction is made for a first offense violation. The penalty imposed is imprisonment in the Penitentiary for not less than 20 years nor more than 40 years.

1970

In 1970, the Ohio Legislature enacted changes in the Ohio Drug Laws but only as they pertain to possession of marijuana. In the words of the Legislature these changes were "to prevent drug abuse by young persons by instructing them in its evil, to revise and expand existing drug laws to meet changing patterns of drug abuse, and to provide for the treatment and rehabilitation of drug dependent persons." (133VH874, p. 2730; eff. September 16, 1970).

The principal change was to "reclassify" marijuana as a hallucinogen rather than a narcotic. The only substantive affect was to make possession of marijuana a misdemeanor for the first offense. Possession for sale [formerly § 3719.20(A)] and sale [formerly § 3719.20(B)] carry the exact penalties as when marijuana was classified as a narcotic. The new penalties are:

Possession (§3719.41)

First Offense: Imprisonment for not more than one year or a fine of $1,000, or both;

Subsequent Offense: Imprisonment in the Penitentiary for not less than one year nor more than 10 years.

Possession for Sale [§3719.44(B)]

First Offense: Imprisonment in the Penitentiary for not less than 10 years nor more than 20 years;

Subsequent Offense: Same as for a First Offense.

Sale [§3719.44(D)]

First Offense: Imprisonment in the Penitentiary for not less than 20 years nor more than 40 years;

Subsequent Offense: Same as for the First Offense.

APPENDIX C

A SUMMARY OF OHIO LAWS RELATING TO POSSESSION AND SALE OF DANGEROUS DRUGS*

A. Laws Pertaining to the Possession and Sale of Barbiturates and Amphetamines

1949

In 1949, the Ohio Legislature enacted the first law to specifically apply to barbiturates (amphetamines were not included until 1969). The penalties for the possession or sale of barbiturates is imprisonment for not more than one year, or a fine not to exceed $500, or both (Former G.C. § 12673, eff. August 12, 1949).

This section covering barbiturates remained relatively unchanged, save a few minor additions until 1969. It did not differentiate between possession and possession for sale (Amen. 10/1/53, 7/26/63, 12/16/64).

1969

In 1969, the Legislature added amphetamines to the barbiturate section and bifurcated the section so as to deal specifically with possession and sale by increasing the penalties (O.R.C. §§ 3719.23 to 3719.29). The penalties which are in force at the time of writing this brief are:

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*Does not refer to the section labeled "Dangerous Drugs" (§4729.50, repealed 12/31/71; but the rest of the section is in effect) but includes the common concept of dangerousness.

Possession [§ 3719.24(D)]

First Offense: Imprisonment for not more than one year or a fine not to exceed $1,000, or both.

Subsequent Offense: Imprisonment in the Penitentiary for not more than 10 years or a fine not to exceed $1,000, or both.

Sale [§ 3719.24(A)]

First Offense: Imprisonment in the Penitentiary for not less than one year nor more than five years or a fine not to exceed $1,000, or both.

Subsequent Offense: Imprisonment in the Penitentiary for not less than two years nor more than twenty years or a fine not to exceed $5,000, or both.

B. Laws Pertaining to the Possession and Sale of a Hallucinogen

1967

In 1967, the Ohio Legislature enacted the first laws specifically to regulate the possession and sale of hallucinogens (O.R.C. §§ 3719.40 to 3719.49; O.R.C. eff. September 20, 1967). As defined by statute a hallucinogen is lysergic acid diethylamide (LSD), psilocybin, mescaline, peyote "and any other compound, mixture, preparation, or substance which produces hallucinations or illusions when introduced into the body." (O.R.C. § 3719.40). The penalties are:

Possession [§ 3719.41]

First Offense: Imprisonment for not more than one year or a fine not to exceed $1,000, or both.

Subsequent Offense: Imprisonment in the Penitentiary for not less than one year nor more than 10 years.

Possession for Sale [§3719.44(B)]

First Offense: Imprisonment in the Penitentiary for not less than 10 years nor more than 20 years.

Subsequent Offense: Same as for the First Offense.

Sale [§3719.44(D)]

First Offense: Imprisonment in the Penitentiary for not less than 20 years nor more than 40 years.

Subsequent Offense: Same as for the First Offense.

Alternative to Possession for Sale and Sale of a Hallucinogen [§3719.42]

The Legislature also enacted §3719.42 which reads: "No person shall . . . knowing a hallucinogen will be used for such purpose . . . sell, offer to sell. . . ." The penalties for a violation of this section are:

First Offense: Imprisonment in the Penitentiary for not less than 2 years nor more than 15 years or a fine not to exceed $10,000, or both;

Second Offense: Imprisonment in the Penitentiary for not less than 5 years nor more than 20 years or a fine not to exceed $10,000, or both.

Subsequent Offense: Imprisonment in the Penitentiary for not less than 10 years nor more than 30 years or a fine not to exceed $10,000, or both.

The Legislature also enacted §3719.43 which has been used in Summit County as an alternative to the other sections covering hallucinogens due to the lesser penalties imposed. This section reads: "No person except a licensed pharmacist or owner of a pharmacy, or a manufacturer licensed under section 3719.42 of the Revised Code shall possess for sale, or sell . . . any hallucinogen without obtaining a license as a wholesaler of hallucinogens from the State Board of Pharmacy."

First Offense: Imprisonment in the Penitentiary for not less than 1 year nor more than 5 years *or* fined not more than $500.

Subsequent Offense: Imprisonment in the Penitentiary for not less than 1 year nor more than 5 years *or* fined not less than $200 nor more than $1,000.

1970

In 1970, the Ohio Legislature reclassified marijuana as a hallucinogen rather than a narcotic (O.R.C. §3719.40; eff. September 16, 1970). Marijuana is now classified with such dangerous hallucinogens as LSD, psilocybin, mescaline, peyote.

C. Laws Pertaining to the Possession and Sale of Dangerous Drugs

1963

In 1963, the Ohio Legislature enacted this section of the Revised Code which restricts the possession and sale of dangerous drugs [O.R.C. §§ 4729.50 to 4729.59; eff. August 8, 1963]. By statute: " 'Dangerous drugs' means: Any drug, which sections 3719.01 to 3719.22, inclusive (narcotic section which then contained marijuana), or section 3719.23 to 3719.29, inclusive (barbiturate section), of the Revised Code, may be dispensed only upon a prescription." [O.R.C. § 3719.50(M)(1)]. The penalties are:

Possession and Sale [§ 4729.51(C)]

First Offense: A fine not less than $100 nor more than $300.

Subsequent Offense: A fine not less than $300 nor more than $500.

1971

In 1971, the Legislature repealed § 4729.50 but added §4729.23 while maintaining the former penalties. Section 4729.28 states: "No person who is not a registered pharmacist or a pharmacy intern under the personal supervision of a registered pharmacist shall compound, dispense, or *sell* drugs, *dangerous drugs*, and poisons." (Eff. December 31, 1971).

Another similar section is Ohio Revised Code §3715.52(L) which has been used in Portage County to cover methaqualudes, i.e., sopors. This section reads: "The sale, offering for sale . . .at retail or to the consumer without a prescription from a physician, veterinarian, or dentist of *any drug* which under Federal or Ohio law can be sold only on prescription" is prohibited.

First Offense: A fine of not less than $100 nor more than $300.

Subsequent Offense: A fine of not less than $300 nor more than $500 and/or imprisoned not less than 30 nor more than 100 days.

APPENDIX D

STATE OF OHIO)
SUMMIT COUNTY) SS:

IN THE COURT OF APPEALS,
NINTH JUDICIAL DISTRICT
No. 6720.

State of Ohio,
Plaintiff-Appellee,

v.

Daryl L. McDonald, s.p.a.
Darrell Leon McDonald,
s.p.a. etc.,
Defendant-Appellant.

OPINION

Decided Feb. 9, 1972.

APPEAL ON QUESTIONS OF LAW

ROBERT E. MOHLER,
Prosecuting Attorney,
STEPHEN M. GABALAC,
Assistant Prosecuting Attorney,
For Plaintiff-Appellee.

TIMOTHY J. MURTY,
and
SAMUEL F. ADAM,
For Defendant-Appellant.

VICTOR, J.

The defendant, Daryl L. McDonald (appellant herein), was indicted, tried by jury, and convicted of the charge of possessing for sale a narcotic drug, i.e., cannabis sativa (marijuana), in violation of Section 3719.20(A), Revised Code, and two charges of the actual sale of such narcotic drug, in violation of Section 3719.20(B), Revised Code. He was sentenced to the Ohio State Penitentiary for those transgressions.

McDonald has filed an appeal in this court from those convictions. He says that:

> "The court should have sustained the defendant-appellant's [McDonald's] motion for a directed verdict for the reason that the prosecution's case established entrapment as a matter of law."

He further says that:

> "* * * his conviction under the * * * indictment violates due process of law and the equal protection of the laws of the Fourteenth Amendment to the Constitution of the United States for the reason that the classification of cannabis sativa as a narcotic by the Ohio legislature is an arbitrary and unreasonable classification.
>
> "* * * the Ohio legislature, effective September 16, 1970 [before the date of McDonald's trial but subsequent to the return of the indictment], has reclassified cannabis sativa as a hallucinogen (see Section 3719.40, 3719.41; and * * * Section 3719.01(K) defining 'narcotic drugs' specifically designating cannabis [sativa] as being excluded from the definition of 'narcotic drugs'."

An examination of this record reveals that on January 9, 1970, police officers, armed with a search warrant, searched the residence of one Wayne Lehman. They found a marijuana cigarette in the pocket of his sports coat. He told the officers that he had obtained marijuana from one Bob Atwood, and a person by the name of Daryl. Actually, he had never purchased marijuana from Daryl and had never talked to him about the purchase of any marijuana; he did not know where Daryl lived, or his telephone number. Lehman had met McDonald while both were in the Armed Services. When Lehman was shown a picture of McDonald, he identified him as the Daryl to whom he had referred.

Lehman agreed to cooperate with the police officers in an effort to purchase marijuana from McDonald; he secured McDonald's telephone number from Bob Atwood and called McDonald four or five times. The first time Lehman called, McDonald refused to sell any marijuana; on another occasion, McDonald said that he did not have any but that he was going to get some. In Lehman's language, McDonald "seemed reluctant."

Lehman stated that he was refused probably three times; that finally McDonald indicated that some marijuana was coming in, and a sale was arranged. The police officers supplied Lehman with money; a rendevous was arranged at Schroeder's bar for February 5, 1970, at which time a purchase of five ounces of marijuana was made. In addition to the marijuana purchased, McDonald gave Lehman a marijuana cigarette. The purchase price was $75; Lehman had $40 in "police money" and agreed to get the other $35 at a later date, which he did; he paid it to McDonald at a place called Bubba's bar.

Thereafter, at the instance of the police officers, Lehman arranged to purchase more marijuana from McDonald; a meeting was set for March 2, 1970, at Bubba's bar; when Lehman arrived at the bar, together with one George Reuscher (a young police officer who was to pose as Lehman's partner), McDonald was not there. While Lehman was there, he was called to the telephone and informed by the caller, who was McDonald, that he was at the Jednota Club; Lehman and Reuscher proceeded to go to the Jednota Club, where they met McDonald. Reuscher was introduced to McDonald as a partner of Lehman's. The three of them then left the bar and went to McDonald's car, where McDonald showed Lehman and Reuscher several packages of keeth. An ounce of keeth was purchased for

$150. Keeth is a form of hashish; it is a derivative of marijuana, but of a more refined and expensive type. After this sale, McDonald was placed under arrest.

Prior to this sale, and while the three men were still in the Jednota Club, Reuscher and McDonald had a conversation about the drug business.

During the course of the trial, Officer George Reuscher testified, in part, as follows:

"Q. Could you tell us what type of conversation you had at that time while seated in the booth across from the defendant, Daryl McDonald?

"A. Yes, started out general conversation. He asked me if I wanted to get into, as he said, quote, 'the business,' and I said, 'Well, I would like to. I don't know too much about it,' and I hadn't had much experience with the narcotics detail; so I couldn't even fake my way through it too much. So, I said, 'No, I haven't had too much experience with it, don't know too much about it.'

"He asked me if I wanted to sell it for profit or use it myself or give it to friends, and I said, 'Frankly, I don't know; I don't know that much about it, whether I could make a profit or not.'

"He said, 'This type of substance'—he explained to me it was a kind of hashish. He called it keeth, which I'd never heard of. He explained to me it came in different colors from a dark red up to a dark green. He said the red, the darker the red, the stronger it was. This was a kind of medium green. He said this was kind of on the borderline; he said the kind, what you call average hashish or keeth.

"He noticed my wedding band, and he said, 'Does your old lady,' quote, 'turn on?' And I said, 'No, she doesn't know too much about, it, my involvement in this, my getting into this.'

"I, I think he again mentioned, 'Was I going to sell it?'

"I said, 'I don't know too much about this type.'

"He said, 'You won't make too much profit on it, but you might break even,' but he said, 'Try it; see if you like it; give it to some of your friends.' He said, 'In a few days I've got a thousand dollar shipment coming in,' said 'I've got a partner named Buzz. If you both want to get in on it there might be some profit for you.'

"Q. Did you talk about purchasing any?

"A. Any of the shipment that was coming in?

"Q. No, buying anything from him that every [sic] evening?

"A. Yes, the hashish or the keeth, as he called it, we talked about that. He brought out a small package, said, 'This is what it looks like.'

"It was kind of a powder form, seemed like a resin, stuck together in a cake-form. It did break very readily. He said if I wanted to sell it—he kind of opened it so you could see what was in his hand—said I could break it up. He said the easiest thing would be to use a table knife and I could break, measure it out on a small gram scale and sell it."

The defendant rested without offering any evidence.

Was the defendant entrapped?

" 'Entrapment' constitutes a valid defense if officers of the law inspire, incite, persuade, or lure a

defendant to commit a crime which he otherwise had no intention of perpetrating."

People v. Toler, 26 Ill. 2d 100; 185 N.E. 2d 874; Certiorari denied, 374 U.S. 813. (This is a case somewhat similar in its facts to the instant case).

However, a person is not entrapped when an officer presents a defendant with the opportunity to commit an offense' for the purpose of detecting a crime. Craft and trickery are available to officers of the law, and their agents, for such purposes. Sorrells v. United States, 287 U.S. 435.

"Entrapment occurs only * * * [when the police] implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute; * * *. [Headnote 2.]

"To determine whether [the defense of] entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal."

Sherman v. United States, 356 U.S. 369; 2 L ed 2d 848.

Also,

"Innocent in the context of entrapment means that the defendant would not have perpetrated the crime for which he is presently charged but for the enticement of the police official."

Hansford v. United States, 303 F. 2d 219 (1962).

In our judgment, the record in the instant case does not show that McDonald was an "unwary innocent" induced to make these sales solely by reason of the activities of the police officers. There is credible evidence in the record to establish that McDonald had the "predisposition and criminal design" to commit the acts

which he claims he was entrapped into commiting, and that he was merely provided with an opportunity to commit a crime for which he was "apt and willing." The trial court properly submitted the issue of entrapment to the jury.

McDonald contends further that the statute under which he was convicted, Section 3719.20, Revised Code (subsections (A) and (B), is unconstitutional, in that cannabis sativa was classified thereunder as a narcotic drug; that such classification is "arbitrary and unreasonable," and that the Legislature has reclassified it as an hallucinogen (Section 3719.40, Revised Code).

This issue is raised for the first time in this court. Ordinarily, questions not raised at trial cannot be raised for the first time on review. See: State v. Gordon, 28 Ohio St. 2d 45 (1971); and State v. Lancaster, 25 Ohio St. 2d 83 (1971). This rule applies to the failure to assert constitutional rights. See: State v. Davis, 1 Ohio St. 2d 28.

However, we note that, notwithstanding the reclassification of cannabis sativa from a "narcotic drug" to a "hallucinogen," the penalty for possession for sale, and the actual sale thereof, whether a narcotic drug or a hallucinogen, is the same. (Revised Code 3719.99, subsections (D) and (F).

Appellant's contention in this regard is without merit.

We have examined all claims of error and find none prejudicial ot the substantial rights of the appellant, Daryl L. McDonald. The judgment is affirmed.

Judgment affirmed.

DOYLE, P.J., and BRENNEMAN, J., concur.

APPENDIX E

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, *1972 TERM*

City of Columbus. *To wit:* *May 18, 1972*

State of Ohio,
Appellee,

vs.

Daryl L. McDonald,
Appellant.

No. 72 200

APPEAL FROM THE COURT OF APPEALS

for SUMMIT *County*

This cause, here on appeal as of right from the Court of Appeals for SUMMIT *County, was heard in the manner prescribed by law, and no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.*

It is further ordered that a copy of this entry be certified by the Clerk of the Court of Appeals for SUMMIT *County for entry.*

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Jounral of this Court.

Witness my hand and the seal of the Court this _____ day of _____ 19 ____

_____ *Clerk*

_____ *Deputy*

_____

APPENDIX F

IN THE SUPREME COURT OF OHIO

Case No. 72 200

STATE OF OHIO)
PLAINTIFF-APPELLEE)
v) MOTION FOR REHEARING
DARYL L. McDONALD)
DEFENDANT-APPELLANT)

Now comes Daryl L. McDonald, Appellant, and moves for rehearing of the Court's judgment of May 18, 1972, dismissing Appellant's appeal from the Court of Appeals' decision on the grounds that no substantial constitutional issues were presented. Appellant contends that current legal developments since the filing of the Memorandum in Support of Jurisdiction which accompanied his Notice of Appeal present grave constitutional considerations not hereinbefore presented to this Court, but which are found in the record of this case and which it is respectfully submitted entitle Daryl L. McDonald, Appellant, to a rehearing. These considerations which shed new light on the important constitutional questions presented are contained in the attached legal memorandum.

/s/

Albert S. Rakas
Attorney at Law

Appellate Review Office
School of Law
The University of Akron
Akron, Ohio 44308

Attorney for Defendant-Appellant

LEGAL MEMORANDUM

1. Within the last two months the report by the National Commission on Marijuana and Drug Abuse entitled: "Marijuana: A Signal of Misunderstanding" was printed and became available [Hereinafter referred to as the National Commission's Report]. In a letter to the President of the United States, dated March 22, 1972, the chairman, Raymond P. Shafer stated:

> This report "Marijuana: A Signal of Misunderstanding" is an all-inclusive effort to present the facts as they are known today, to demythologize the controversy surrounding marijuana, and to place in proper perspective one of the most emotional and explosive issues of our time. We on the Commission sincerely hope it will play a significant role in bringing uniformity and rationality to our marijuana laws, both federal and state. . . .

The report states: "In a large measure, the marijuana issue is a child of the sixties, the visual and somewhat pungent symbol of dramatic changes which have permanently affected our nation in the last decade." [National Commission's Report at p. 1]. Continuing, the report states: "Marijuana becomes more than a drug; it becomes a symbol of the rejection of cherished values" [National Commission's Report at p. 9]. It further states:

> The symbolic aspects of marihuana are the most intangible of the items to which the Commission must address itself, and yet they may be at the heart of the marihuana problem. *Use of marihuana was, and still is, age-specific.* It was youth-related at a time in American history when the adult society was alarmed by the implications of the youth "movement": the defiance of the established order, the adoption of new life styles, the emergence of "street

people," campus unrest, drug use, communal living, protest politics, and even political radicalism. In an age characterized by the so-called generation gap, *marihuana symbolizes the cultural divide.* [Emphasis added].

For youth, marihuana became a *convenient symbol* of disaffection with traditional society, an allure which supplemented its recreational attraction. Smoking marihuana may have appealed to large numbers of youth who opposed certain policies or trends, *but who maintained faith in the American system as a whole.* In a time when symbolic speech is often preferred to the literal form, marihuana was a convenient instrument of mini-protest. It was also an agent of group solidarity, as the widely publicized rock concerts so well illustrate.

For the adult society, the decade of the sixties was a distressing time. The net effect of racial unrest, campus disruption, political assassination, economic woes and an unpopular war was widespread uneasiness. Attending a general fear that the nation was witnessing its own disintegration was a desire to shore up our institutions and hold the line. *That line was easy to define where drugs, particularly marihuana, was concerned.* [Emphasis added].

Use of drugs, including marihuana, is against the law. For many, marihuana symbolized disorder in a society frustrated by increasing lawlessness. Insistence on application of the law tended also to harden views, thereby *escalating* still further the use of marihuana as a symbolic issue. [Emphasis added]. [National Commission's Report at p. 9].

This symbolic issue albeit its social and moral implications has been exacerbated by the use of harsh

criminal laws. It is ironic that our present marijuana laws are upheld chiefly by the older generation, and flounted and condemned by the young; for it is the senior generation that should understand the issue most clearly, having lived through the era of alcohol prohibition. They saw through their own eyes the moral breakdown percipitated by the enforcement of laws enacted to reinforce the majority's views of morality. This has the debilitating affect on society of creating criminals who otherwise are law-abiding citizens.

As stated by John Finlator, recently retired Deputy Director of the Federal Bureau of Narcotics and Dangerous Drugs, on February 9, 1972: "... I have learned through my many years of experience (36 years) that repressive criminal laws will never solve our drug problem. ... We have ruined the careers and lives of hundreds of thousands of otherwise law-abiding citizens by needlessly subjecting them to the ramifications of being defined criminals." As one author has correctly noted, the "younger generation" has been transformed into the "probation generation."

As pointed out in Appellant's motion in support of jurisdiction, the legal issues surrounding this moral and social question, i.e., entrapment and arbitrary and unreasonable classificaiton, were first presented in *People v. McCabe*, 275 N.E.2d 407 (1971). This case can be considered the spark which has brought to the forefront the legal issues which are intertwined in this moral issue.

Since filing of the memorandum in support of jurisdiction, the Supreme Court of Michigan in *People v. Sinclair*, 194 N.E.2d 879 (decided March 9, 1972), has turned that initial spark into the full blown controversy which is presently occupying center stage of the courts

throughout this state and the country. Since two of our sister states' supreme courts, Illinois and now Michigan, have already addressed these legal issues, (entrapment and classification) it was inevitable that the legal controversy would spill over into Ohio.

Further, just recently it is reported that Judge Evan J. Reed of the Common Pleas Court for the City of Akron has granted a post-conviction motion on behalf of Leon M. Graham who was found guilty of possession for sale of marijuana. It was reported that Attorney Bruce Metz with the concurrence of Judge Reed will argue the issue of constitutionality of the classification of marijuana and the prescribed sentences and the admissibility of polygraph evidence to be used in support to the defendant's claim of entrapment. See Akron Beacon Journal, May 21, 1972, City Ed., p. A48, columns 1-8.

The constitutionality of the classification of marijuana with so-called "hard drugs" and the issue of entrapment which are inextricably bound in any arrest for sale or possession for sale of marijuana are and will continue to be challenged in various Ohio courts at various levels under various different judicial settings. This situation gives rise to the very real possibility of more confusion than presently exists. Since this Court has the affirmative duty to supervise the judicial machinery in Ohio, it is compelled by the need for the efficient administration of justice to clarify these nebulous legal issues. This Court, due to its primordial position in the hierarchy of Ohio courts, can legitimatize in the eyes of Ohio citizens (both young and old) these constitutional questions rather than permitting an ad hoc approach by the lower state courts.

2. The Court of Appeals below distinguished *McCabe, supra*, from the instant case by noting that the penalties

for sale and possession for sale of marijuana had remained the same albeit the change in classificaiton. Therefore the Court reasoned the Appellant's contention that the classification was unconstitutional was without merit. This constitutional argument has taken on new dimensions since *People v. Sinclair, supra,* which is directly analogous to the case at bar, has been decided. Although not directly addressing itself to the rationale used by the Court below, *Sinclair, supra,* substantively undercut the lower court's reasoning.

(A) The plurality decision in *Sinclair, supra,* held that the statutory classification of marijuana along with "hard drug" narcotics for purposes of imposition of penalties denied equal protection of the laws. The denial of equal protection of the laws is brought about by classifying marijuana with hard drugs. The classification is arbitrary and unreasonable for there exists ample scientific proof that marijuana is less dangerous than barbituates or amphetemines or any other hallucinogens. It makes little difference if you label marijuana a narcotic or a hallucinogen, if by so doing the later classification still is arbitrary or unreasonable based on existing factual considerations. It is the operational definition which is the basis of the constitutional challenge and not the statutory sentence imposed. The Court of Appeals below, in light of the *Sinclair* decision misinterpreted the substance of the constitutional challenge. It is the Appellant's contention that in light of *Sinclair, supra,* his motion for leave to appeal must be given reconsideration.

(B) This Court as well as the Court of Appeals below has the power to examine the facts upon which a classification is based. As stated by the U.S. Supreme Court in *Leary v. United States,* 395 U.S. 6 (1969) at 38, fn. 68:

A statute based upon a legislative declaration of facts is subject to constitutional attack on the ground that the facts no longer exist; in ruling upon such a challenge a court *must, of course, be free to re-examine the factual declaration.* [Emphasis added].

In the instant case, the subsequent legislation was passed on inadequate or erroneous factual considerations. Legislation based on the police power is invalid where facts and experience show that it is arbitrary. See *Abie State Bank v. Bryon,* 282 U.S. 765, 772 (1931). See also *Brown v. Board of Education,* 347 U.S. 483, 494-495 (1954) and *Leary v. United States, supra.*

(C) The Court of Appeals below was not completely accurate when it noted that the penalties for possession for sale and sale remained the same. This confusion can be attributed to the fact that the statutes in question were recently enacted and the nuances of said laws are not completely known. The Court below was referring to a violation of §3719.44 of the Revised Code as the basis for its conclusion. But, the Appellant wishes to draw to the attention of this Court §3719.42 of the Revised Code which reads: "No person shall . . . knowing an hallucinogen will be used for such purpose . . . sell, offer to sell . . . ." A violation of this section carries with it a statutory sentence of a minimum of two years to a maximum of fifteen years.

This difference further supports the Appellant's contention that the classification is arbitrary and unreasonable. In fact this aspect of the constitutional attack on the classification of marijuana will be argued in *Roush v. State,* which is presently before the Fifth District Court of Appeals. This only emphasizes the need for this Court to affirmatively address itself on rehearing to the constitutional challenges presented.

3. The foregoing petition for rehearing is believed to be meritorious and is presented in good faith and not for purposes of delay.

The availability to the public of the President's Commission Report and the tremendous ramification of the Michigan Supreme Court decision, all of which occurred since the filing of the memorandum of jurisdiction, make the constitutional questions contained within this case one of the foremost social/legal questions of our time. The people of Ohio are deeply concerned as to whether former standards are now completely eroded or are still sound. The younger generation for whom this is an especially important question look for guidance not the area of speculative guesswork in which they now find themselves. The importance of these questions can readily be seen by the large number of prestigious amicus curiae briefs which were filed in the *Sinclair*, *supra*, case. Among those that filed are the following:

1. David Hood, Wayne State University, Detroit, of counsel for subcommittee on drug treatment, New Detroit, Inc., amicus curiae.
2. Bernard D. Fischman, New York City, for the American Orthospychiatric Assn., Inc., amicus curiae.
3. Philip J. Hirschkop, Alexandria, Va., Executive Director, Penal Reform Institute, amicus curiae in support of appeal.
4. Sol Plafkin, Detroit, for representatives Jackie Vaughn III, William Brodhead, James Bradley, Edward Suski, Mrs. Daisy Elliot, Senators Coleman Young, Basil Brown, and Jack Faxon, amici curiae.

Similarly it is anticipated that upon the Court's certifying of the record numerous eminent authorities

will request to file briefs in the present case. Appellant prays for these reasons and others found in the record the Court will grant this motion.

Respectfully submitted,

/s/

Albert S. Rakas
Attorney at Law

Appellate Review Office
School of Law
The University of Akron
Akron, Ohio 44304

Attorney for Defendant-Appellant

PROOF OF SERVICE

I hereby certify that on this 30 day of May, 1972, a copy of the foregoing Motion for Rehearing and attached legal memorandum was served upon Mr. Robert E. Mohler, Prosecuting Attorney, City-County Safety Building, Akron, Ohio.

/s/

Albert S. Rakas
Attorney at Law

Appellate Review Office
School of Law
The University of Akron
Akron, Ohio 44304

Attorney for Defendant-Appellant

APPENDIX G

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, *1972 TERM*

City of Columbus. *To wit:* June 15, 1972

No. 72-200

State of Ohio,
Appellee,

vs.

Daryl L. McDonald, s.p.a. Darrell Leon McDonald,
Appellant.

REHEARING

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No.___Page___

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 15th *day of* June, *1972.*

THOMAS L. STARTZMAN *Clerk.*

By _____ *Deputy.*

FILE COPY

Supreme Court, U. S.
FILED
JAN 29 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1972

No. 72-425

DARYL L. McDONALD,
Petitioner,

vs.

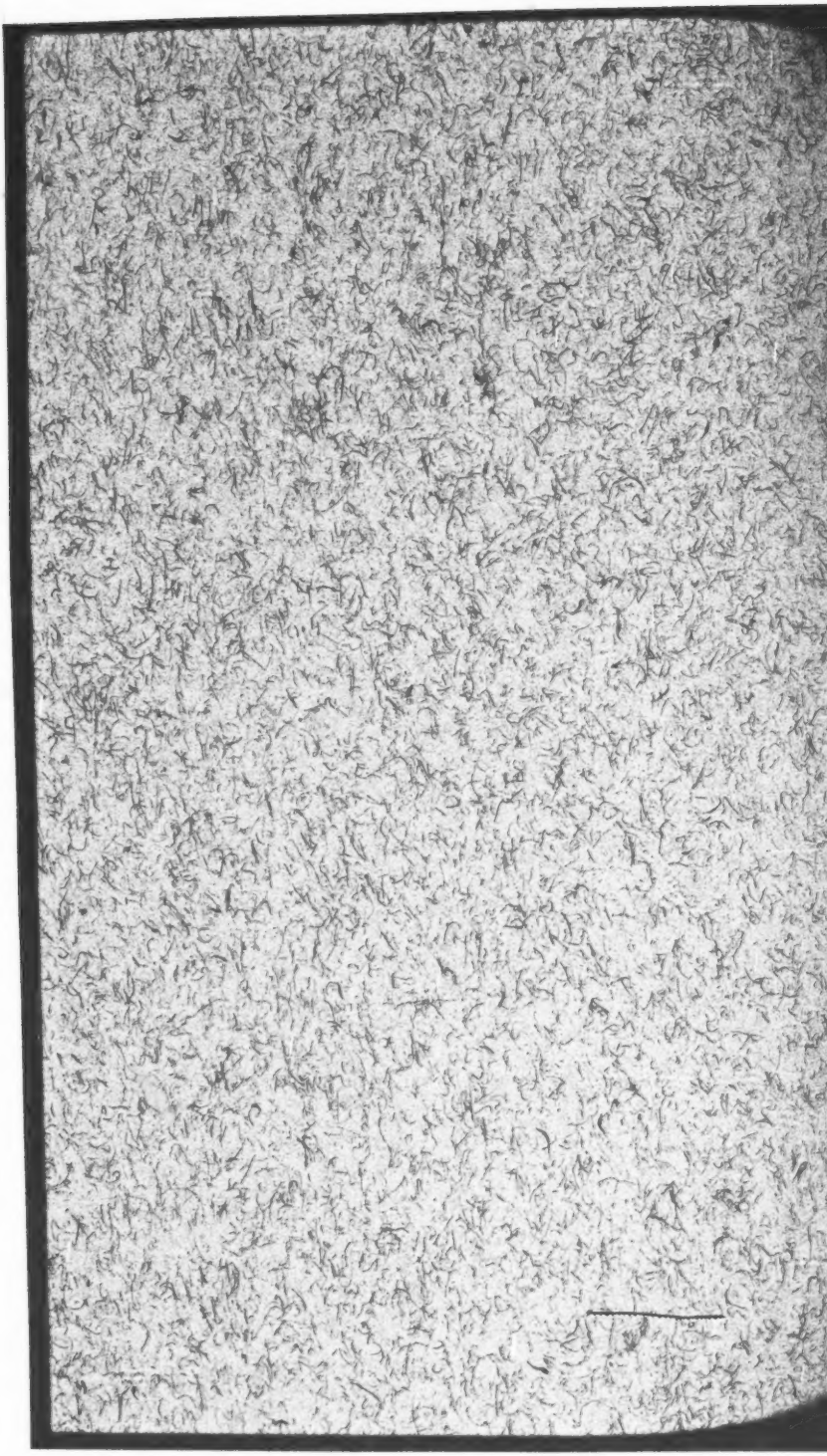
STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION

STEPHAN M. GABALAC
Prosecuting Attorney
PATRICK W. SEMEGEN
Assistant Prosecuting Attorney
County Safety Building
53 East Center Street
Akron, Ohio
Counsel for Respondent

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5447



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In the Supreme Court of the United States

October Term, 1972

No. 72-425

DARYL L. McDONALD,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION

STATEMENT OF ISSUES

I. Whether the Ohio drug laws as enacted and enforced violate petitioner's right to Due Process of Law and Equal Protection of the Laws as written in Amendment 14, United States Constitution.

II. Whether the Ohio drug laws as enforced by the Prosecuting Attorney of each county within the State constitute an abuse of discretion that violates petitioner's right to Due Process of Law and Equal Protection of the Laws as written in Amendment 14, United States Constitution.

III. Whether the statutory penalties for violation of the Ohio drug laws constitute a violation of the petitioner's right to be free from Cruel and Unusual Punishments as written in Amendment 8, United States Constitution.

IV. Whether petitioner was unlawfully entrapped by state officers in violation of petitioner's right to Due Process of Law, as written in Amendment 14, United States Constitution.

STATEMENT OF THE CASE

On January 9, 1970, police officers armed with a properly executed search warrant entered the home of one, Wayne Lehman. The officers involved were special detectives from the narcotics unit of the Akron Police Department. A thorough search of the premises uncovered only a single piece of incriminating evidence, a small hand-rolled marijuana cigarette that had been found in the breast pocket of a sports coat belonging to Lehman. The coat was found in the upstairs bedroom closet.

Thereafter, Lehman was arrested and advised of his rights as required by law. Lehman was transported to the central detective bureau where he agreed to cooperate with the investigating officers. At that time marijuana was classified as a narcotic drug and the possession of the drug was a felony carrying a penalty of from two to fifteen years plus a fine, Revised Code 3719.09. In exchange for information and cooperation from Lehman in their general investigation, the officers chose not to charge Lehman for the offense. Ohio has an immunity statute, Revised Code 3719.70, which grants immunity from prosecution to those persons who aid the police by supplying information or assistance in the investigation and control of illicit drug traffic.

When asked about his source of supply, Lehman produced two names, Robert Atwood, Lehman's brother-in-law, and a man known only to him (Lehman) as "Daryl."

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Lehman indicated that he had known Daryl while both had served in the military together. Lehman could not supply the officers with a last name for "Daryl." Daryl was known to the narcotics officers as Daryl McDonald whom the officers suspected of illegal drug dealings. The detectives produced a photograph of McDonald and Lehman identified him as the man he knew as "Daryl." Lehman told the police that he had never directly purchased drugs from McDonald, but that McDonald sold to Lehman's brother-in-law, Robert Atwood.

Lehman then agreed to attempt to purchase marijuana or hashish from McDonald with monies supplied by the police. Following his initial requests, Lehman was informed by McDonald that he (McDonald) had nothing to sell at the moment, but that McDonald was expecting a new shipment in the near future. Lehman again contacted McDonald and a meeting was arranged between the two of them for February 5, 1970 at a public tavern called Schroeder's Bar.

The first purchase occurred on that date. Lehman testified that he entered the bar and observed McDonald sitting alone in the fourth booth. They greeted each other and then walked outside. Lehman purchased five ounces of marijuana from McDonald for $75.00. Lehman paid $40.00 in cash which had been marked and supplied by the police; the remainder was to be paid a few days later. That rendezvous was set at another tavern, Bubba's Bar, where Lehman paid the $35.00 balance.

The second purchase occurred on March 2, 1970, almost a full month from the date of the original transaction. Again the two parties agreed to meet at Bubba's Bar. This time Lehman was accompanied by an undercover detective, Officer George Reuscher. When they arrived at the pre-

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arranged time, McDonald was not present so both men waited. A few minutes later McDonald telephoned Lehman at the bar and told him instead to meet him immediately at another bar, the Jednota Club. Both Lehman and Reuscher then proceeded to the Jednota Club address.

The three men then met at the Jednota Club while other officers waited outside. Inside, McDonald had conversations with both Lehman and Reuscher. McDonald explained the operation of his business to both men, especially Reuscher, and encouraged both men to operate as sellers for him in the future. Lehman then purchased an ounce of keeth, a form of hashish, for $150.00 from the petitioner. All of the bills used were marked with their serial numbers previously recorded. Upon leaving the bar, McDonald was arrested by the officers outside.

Petitioner was arrested and charged with two counts of unlawful sale of a narcotic drug, Revised Code 3719.20 (B). The first count arose out of the February 5 sale at Schroeder's Bar; the second count arose out of the March 2 sale at the Jednota Club. In addition, petitioner was charged with unlawful possession for sale of a narcotic drug, Revised Code 3719.20 (A), because he had in his possession a substantial quantity of keeth (in addition to that previously sold) at the moment of his arrest outside of the Jednota Club on March 2, 1970. Exactly one month later, April 2, 1970, McDonald was indicted on all three charges in a multi-count indictment.

Trial was begun on February 8, 1971. At that time the defendant, in addition to entry of a general plea of not guilty, moved for a directed verdict on the issue of entrapment as a matter of law. The trial court overruled the motion, yet agreed to submit the issue to the jury on its

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final instructions. Following deliberations, the jury returned a verdict of guilty as charged on all three counts. A motion for new trial was overruled and the petitioner was sentenced to thirty to sixty years. Both counts of sale of a narcotic were to be served concurrently (20-40), but the possession for sale count (10-20) was to be served consecutively with the two counts of unlawful sale.

Petitioner appealed his conviction solely on the issue of entrapment to the Court of Appeals, Ninth Judicial District, Ohio, which affirmed the conviction on February 9, 1972. McDonald then appealed to the Supreme Court of Ohio, this time again on the issue of entrapment and the limited issue of whether the intervening change in the statute voided the conviction. The Court affirmed without opinion on May 18, 1972. Petitioner applied for rehearing on his cause which was denied on June 15, 1972. A petition for writ of certiorari was filed with this Court on September 13, 1972. From that petition the respondent respectfully files this Brief in Opposition.

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ARGUMENT

PROPOSITION OF LAW NUMBER ONE

The Narcotic and Drug Laws of Ohio as lawfully enacted and enforced do NOT violate petitioner's right to Equal Protection of the laws within the meaning of the Fourteenth Amendment.

Petitioner alleges as his first assignment of error, essentially, a general objection to the Ohio laws as they refer to the sale of hallucinogens, specifically hashish. The law as presently amended defines hallucinogenic drugs as lysergic acid diethylamide, known as LSD, cannabis known as marijuana, and hashish. Revised Code 3719.40. The law also goes on to name several additional drugs. Sale of hashish is a violation of Revised Code 3719.44 (D) as amended March 18, 1969. Prior to that date hashish was considered a narcotic in Ohio and its sale was prohibited by Revised Code 3719.20 (B). That statute as amended became effective on September 16, 1955.

In this appeal, petitioner raises for the first time each issue present in his brief with the exception of the entrapment issue. At each stage of the case, McDonald, through his attorneys at no time posed any formal objection to the law or its penal application. For that reason, those issues (excepting entrapment) have never been timely raised. Normally, issues not raised at trial or on initial appeal cannot be later raised for the first time, *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936). See also *State v. Lancaster*, 25 Ohio St. 2d 83 (1971) and *State v. Gordon*, 28 Ohio St. 2d 45 (1971). Consequently, the State of Ohio would move the Court to ignore those issues in the

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brief of petitioner because they have not been timely presented.

The State of Ohio would also draw the Court's attention to the obvious political nature of the present case. No doubt, the Court may take judicial notice that the drug laws of the several states, as well as the nation itself, represent a continuing political issue. The Court has expressed in the past that the determination of whether a statute has been duly enacted after sufficient study and debate by the legislative branch is a political question and not an issue which the Supreme Court will review. *Coleman v. Miller,* 307 U.S. 433 (1939). Similarly, the issue of the propriety of marijuana laws in general is, on its face, a political and non justiciable question which fails to meet any of the standards discussed by the Court in *Baker v. Carr,* 369 U.S. 186, 82 S. Ct. 691 (1962). The state enactment of laws relating to the use and sale of drugs hardly involves the breach of state police power or the violation of any fundamental federal right.

The regulation of drugs and medicines falls squarely within the lawful functions of the state police power. In *Spencer v. Sacks,* 173 Ohio St. 419, 183 N.E.2d 363 (1962), the Ohio Supreme Court declared that in the exercise of its police power a state may regulate the administration, sale, prescription, possession and use of narcotic drugs. The Ohio Court later went on to say that the state had the right to classify marijuana and hashish as a dangerous drug if it so desired.

State legislation enacted within the umbrella of the police powers is generally presumed to be constitutional. The burden rests on the petitioner to demonstrate that the Ohio law abridges a prescribed federal right. Substantive due process requires a reasonable basis for enactment.

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Surely the State has the right (if not the moral responsibility) to protect its citizens from the dangers of harmful drug traffic. The law itself is clearly founded on a valid state purpose. The means selected to accomplish that purpose, i. e., the criminal laws is also valid. Every jurisdiction has utilized its criminal laws as the major enforcement arm to accomplish those objectives.

Much of petitioner's argument deals with the drug classification itself. He presents the circular argument that, on one hand, to include marijuana and hashish with other drugs such as morphine and heroin in terms of identical penalty for sale of those substances is constitutionally impermissive. Yet he later argues that it is also constitutionally impermissive to have different penalties for sale of barbiturates or amphetamines as opposed to the penalty for sale of marijuana. Within certain limitations, the issue of penalty is a state function. This merely illustrates the quagmire that the Court will enter if it chooses to review each provision of a criminal statute which appears on its face to be valid. Penalty factors and their relationships to other crimes are considerations for the legislature at the time of enactment and it would be inadvisable for the Court to entertain that function. In addition, the Fourteen Amendment protects "persons" and not chemical substances. The word "persons" is specifically used in the language of the amendment. Comparisons with other drugs is a comparison between substances and not "persons" within the meaning of the amendment. It is only when those differences operate to create unreasonable and discriminatory results between classes of persons that the amendment becomes operative. Any difference in classification that does result is one that is based upon reason from contemporary scientific knowledge.

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Petitioner places great emphasis on the fact that recently several states have begun to seriously review their narcotic laws. That is a policy to be determined by each state within its sovereign powers. Merely because a few states choose to change their policy does not give birth to a new constitutional principle. The regulation of drugs is a sovereign decision for each state. Nothing requires that the Michigan laws on the subject be identical to the neighboring Ohio laws. If there is, in fact, a national priority that the drug laws in each state be uniform, then that is the jurisdiction of Congress to set that national policy.

The Court should take great care in this case to respect the constitutional separation of powers. The majority of petitioner's arguments deal with the general legislation of marijuana. These arguments are best directed to the legislative branch rather than to the attention of the Supreme Court of the United States under the guise of some heavily contrived constitutional doctrine.

PROPOSITION OF LAW NUMBER TWO

Any discretion exercised by the prosecutor is consistent with his professional duty and oath of office and not violative of any constitutional provision.

Petitioner maintains that the prosecutor has the right to pick and choose among a number of statutes regardless of the facts or circumstances of the criminal act charged. On the contrary, the prosecuting attorney is bound by statute and by the Canons of Professional Ethics to apply the law as drafted and intended by the Legislature.

Ohio maintains a comprehensive scheme to control illegal drug traffic within its borders. Each of these stat-

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utes is definite in its description and penalty of the criminal act. For example:

A. Revised Code 3719.101; Knowingly permitting the use of Dwelling house for the illegal keeping or dispensing of narcotic drugs.

B. Revised Code 3719.172; Illegal Possession of Instruments for Administering Drugs.

C. Revised Code 3719.41; Possession of an Hallucinogen.

D. Revised Code 3719.44 (B); Possess with the intent to sell any hallucinogen.

E. Revised Code 3719.44 (D); Sale of an Hallucinogen.

Each section defines a specific criminal act. Each section provides for a specific penalty, Revised Code 3719.99 et seq., separate and apart from any other crime charged.

The prosecuting attorney is the chief law enforcement officer of the county. Revised Code 309.01 provides:

> There shall be elected quadrennially in each county a prosecuting attorney who shall hold office for four years, beginning on the first Monday of January next after his election.

Revised Code 309.08 defines the powers and duties of the prosecuting attorney:

> The prosecuting attorney may inquire into the commission of crimes within the county and shall prosecute, on behalf of the State, all complaints, suits, and controversies in which the State is a party, and such other suits, matters, and controversies as he is required

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to prosecute within or outside the county in the probate court, court of common pleas, and courts of appeal.

Petitioner maintains that the prosecuting attorney arbitrarily and capriciously selected the charge to be placed against the defendant. No evidence of such abuse of office has ever been placed before this Court, nor has any such issue ever been raised either in the trial court, Court of Appeals, or the Supreme Court of Ohio.

McDonald sold what is presently defined as an hallucinogenic drug, Revised Code 3719.40, to an undercover agent. He was arrested, charged, and prosecuted for the illegal sale of that drug.

The selection as to whether to prosecute, and on what charge to prosecute is a duty and responsibility of public office. The Court must presume, absent any facts to the contrary, that "Official duty has been regularly performed." *People v. Gray*, 254 Cal. App. 2d 256, 63 Cal. Rptr. 211 (1967).

This Court has upheld the right of the prosecutor to select the crime to charge where the facts of the case are consistent with the elements of the crime charged. Justice Clark held in *Oyler v. Boles*, 368 U.S. 448, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962), that the decision to prosecute will not be overturned on grounds of equal protection absent a clear showing that the decision was based on race, religion, or other arbitrary classification. See also *Oregon v. Hicks*, 213 Or. 619, 325 P.2d 794 (1958).

The burden of showing an abuse of prosecutorial discretion rests with the defendant. The prosecutor is presumed to have acted lawfully in the performance of his office. In this case petitioner, through his attorneys, has

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only attempted to make bald allegations. Nothing alleged is at all supported by the record or by any means of documentation. The test has been previously determined by this Court in *Snowden v. Hughes*, 321 U.S. 1, 64 S. Ct. 397, 88 L. Ed. 497, where the Court stated at page 8:

> The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination.

More directly in point is *Hutcherson v. United States*, 120 U.S. App. D.C. 274, 345 F.2d 964 (1965). Hutcherson had sought appeal on the basis that he should have been charged under the D. C. Code rather than his charge and resulting conviction under the Federal statute. He felt entitled to be charged under the D. C. Code because the penalty was less severe than that provided by the Federal statute. The conviction was affirmed on the basis that the defendant has no constitutional right to elect which of two applicable statutes shall be the basis of his indictment and prosecution.

Also applicable is *Deutsch v. Aderhold, Warden*, 80 F.2d 677 (5th Cir. 1935):

> The United States attorney of the district where a violation of a federal statute occurs, is charged with the duty of prosecution and vested with complete control over the proceedings, in the exercise of sound discretion. If the facts show a violation of two or more statutes, he may elect under which he will prosecute in the absence of a prohibitory statute

PROPOSITION OF LAW NUMBER THREE

The lawful penalties imposed for violation of the Ohio narcotic and drug statutes fail to meet any of the enumerated tests or standards to make the penalties in conflict with the Eighth Amendment, Cruel and Unusual Punishment Clause.

Petitioner alleges in his brief that the penalties imposed for violation of the Ohio narcotic drug laws, namely ten to twenty years for possession for sale and twenty to forty years for sale, are so disproportionate and excessive as to constitute cruel and unusual punishment within the purview of the Eighth Amendment. Such an argument by its very nature is necessarily subjective.

The Cruel and Unusual Punishment Clause is one which the Court has dealt with in the past. It is one which the Court has used quite sparingly throughout the course of our history. By its very nature the clause cannot be easily defined. One man's conception of what would constitute Cruel and Unusual Punishment will often differ from another's.

Under the concept of individual state sovereignty each state is free, within certain boundaries to fashion a scheme of punishments under its criminal laws. The penalties imposed by one state need not be exactly uniform in severity to that imposed by its sister states. The Court should not step in to create a scheme of National punishments merely because there is no absolute uniformity of punishments for similar offenses. Only where the punishment exceeds the boundaries of human reason should the Court intervene to restructure the penalties imposed by a particular test.

In *State v. Chaffin*, 30 Ohio St. 2d 13 (1972), the Ohio Supreme Court considered the same issue presently before this Court, that is, whether the penalties for violation of the drug statutes are unconscionably excessive. The Ohio court adopted the classical test most frequently used by this Court. The test applied was whether the penalty was so greatly disproportionate to the offense as to shock the sense of justice of the community.

> It is generally accepted that punishments which are prohibited by the Eighth Amendment are limited to torture or other barbarous punishments, degrading punishments unknown to common law, and punishments which are so disproportionate to the offense as to shock the moral sense of the community . . . Where the offense is slight, more may be prohibited than savage atrocities. However, the penalty must be so greatly disproportionate to the offense as to shock the sense of justice of the community.

See also *Kasper v. Brittain*, 245 F.2d 92 (1957), *State v. Juliano*, 24 Ohio St. 2d 117 (1970), *Weems v. U. S.*, 217 U.S. 371 (1910).

Petitioner in his brief substantially ignores this classical test. By his own admission every state in the Union plus the Federal statutes all prohibit the sale of dangerous drugs. Each of these jurisdictions provide a penalty for their violation.

Instead, petitioner relies mainly on the special doctrines implicit in *Furman v. Georgia*, 92 S. Ct. 2726 (1972), and *Robinson v. California*, 370 U.S. 660 (1962). Both of these cases can be distinguished for the purposes of the present case. In *Robinson*, the penalty was found to be cruel and unusual because it penalized a state of mind

and not an *act* as such. The penalty was felt to violate the philosophical concept of free will since Robinson was imprisoned for the *state of addiction*. He was not sentenced for possessing narcotics or for their sale. Under those circumstances a seemingly innocuous penalty could be considered impermissibly excessive. No such factors are present in McDonald's history. He was not an addict, and was indicted and convicted for sale of narcotics. It is important to note that where the illness or state of mind is no longer confined to the individual, but begins to affect the public order and tranquility the Court has declined to extend the *Robinson* rationale. See *Powell v. Texas*, 392 U.S. 514, 88 S. Ct. 2145 (1968).

In *Furman* the Court was dealing with a legal issue not analogous to the present one. Capital punishment represented a social issue that men have been weighing for centuries. It was an issue which was extensively researched and written about from all possible viewpoints. No such volume of opinions exists for the issue of marijuana. Only recently have the necessary medical research and study been applied to the issue. At the present time the empirical data seems inconclusive on the subject.

Furman also presented the added variable that the statutory penalties were not being uniformly applied within the State. The statistical differential between execution of blacks and minorities as opposed to whites was readily apparent. The penalty imposed for sale of narcotics in Ohio, on the other hand, has been uniformly applied to all those convicted under the statute. No invidious class discrimination is present in the enforcement of the statute. The only exception has occurred where the defendant was convicted of the lesser included offense of possession for purposes of sale which imposes the ten to twenty penalty.

Lastly, petitioner presents the novel proposition that the penalty has been substantially rejected by contemporary society (citing *Furman*). He reasons that the penalty is *per se* excessive because of the large volume of marijuana use in our society. The Court must not become confused by this reasoning. McDonald was not convicted because of his personal use, but because he sold the contraband article to a third party. Ohio provides for smaller penalties for personal use and has adopted the policy of utilizing stronger enforcement tools to prevent growing drug abuse through transfers and sales to others. Assuming that the law itself is justified, if the use of marijuana is as prevalent as petitioner suggests, then it is incumbent on the state to punish violations strongly and effectively to prevent the further spread of drug abuse.

Petitioner also cites California Proposition Number 19 (November 1972 referendum) as evidence that both the law and punishment are substantially rejected by contemporary society. As evidence of the attitude of its citizens, the Court should take judicial notice that that issue was defeated by a 2-1 majority by the electorate.

Petitioner also presents the theory that the penal purpose could be more effectively achieved through some less severe punishment. The facts of this case do not dictate such a conclusion. McDonald's crime was not the result of some social maladjustment. As a dealer in drugs, he was aware of the crime and its punishment. His crime was not the result of subtle, indirect environmental factors. Unlike *Robinson, supra,* or *Sherman, infra,* he was not motivated through illness or addiction to accomplish his crime. His sole motivation was the result of his desire to enter into a transaction for personal profit. His personal greed was the basis for his decision to engage in criminal

activity. Rehabilitation begins with punishment and the personal admission that one has engaged in criminal conduct. If Ohio and other states are prevented from imposing the punishments they feel necessary to combat the growing problem of drug abuse, then all of their other efforts such as public education; intrastate, interstate, and international enforcement; medical treatment for addicts, as well as the rehabilitation of the prisoner himself are all doomed to failure.

PROPOSITION OF LAW NUMBER FOUR

When government officers offer only the opportunity for the subject to commit a crime and the subject is so predisposed in his intent to commit the crime prior to the approach by law enforcement officers; the affirmative defense of entrapment is not established as a matter of law when the subject subsequently makes an illegal sale to a civilian informant in the presence of a police officer.

In the prosecution of drug related offenses it has been found that the use of a civilian informant is indispensable in dealing with the problems of drug abuse. This procedure of using informants is well accepted in our Ohio courts. Immunity from prosecution for the informant who cooperates with law enforcement officials is now provided in Revised Code Section 3719.70 for those persons who cooperate in gaining evidence.

Entrapment does constitute a valid defense to the crime where the evidence does show that the commission of the crime resulted from the "creative activity" of the police or the informant and not from the defendant himself. Where, however, the agents afford only the opportunity or facility for the commission of the offense, en-

trapment is not established as a matter of law. *Sherman v. U. S.*, 356 U.S. 369, 78 S. Ct. 819, 2 L. Ed. 2d 848 (1958).

Whether entrapment has occurred depends on the facts and circumstances of each particular case. The jury must weigh both the conduct of the police as against that of the defendant. Where the design to commit the offense is formulated in the mind of the accused, and not the police officers, entrapment is not established. The important element is to determine in whose mind the crime originated.

This issue was duly presented to the jury at trial by the judge. He instructed them as to the elements of entrapment and the various tests that have been formulated by the higher courts. In convicting the defendant the jury rejected the entrapment issue and by implication found the conduct of the investigating officers to be proper.

In addition, it is clearly proper for the officers to set a trap for the unwary criminal. As pointed out in the Opinion of the Court of Appeals, craft and trickery are available to the police where they merely afforded the opportunity, such as time, place, and marked money to commit the offense. *Sorrells v. U. S.*, 287 U.S. 435, 53 S. Ct. 210, 77 L. Ed. 413 (1932). Strong evidence does exist in the case to show that the appellant was not an "unwary innocent," but an "unwary criminal."

Since the federal courts first recognized the entrapment defense in *Woo Wai v. United States*, 223 F. 412 (9th Cir. 1915), the Justices and scholars have been deeply divided as to the appropriate standard to be applied to the alleged entrapment situation. To date basically three theories have been advanced to deal with the controversy.

The first represents the majority view in *Sorrells* and *Sherman* (Warren rule). This is the much discussed

"origin of intent" test which was applied by the lower courts in this case. Each court below felt that McDonald's conduct met the prerequisites of that test, i. e., predisposition of the defendant, etc. This is the view most favored by the bench, yet it is not without its critics. Its effect is to cause entrapment to become an affirmative defense that the defendant must himself establish.

The second represents the minority view in *Sorrells* and *Sherman* (Frankfurter-Roberts test). This test centers the inquiry on the conduct of the police and not the defendant. The examination is centered upon the alleged overreaching of the government officers. The basis of the theory is the proper use of government and official power. The Court looks at factors such as the conception, planning and execution of the act itself to see if it is the creation of the police and not the accused. This theory places an additional handicap on the prosecution. They are forced to affirmatively demonstrate that the intent originated from the accused conduct and not their own. Thus, where the police agent begins by a mere offer to buy, which is later acted upon after deliberation by the defendant, entrapment would be present just because the state was the initiator with a mere offer to buy.

The third, and least accepted view, seeks to balance the conduct and predispositions of both parties. This theory suffers from what would surely become a lack of uniformity that results whenever any balancing or equitable test is used. This is the view proposed by the drafters of the Model Penal Code, American Law Institute, Article 2, Section 2.13 (1962).

If the Court is to continue applying the Warren test, the judgment below should be affirmed. If the Court switches to the Roberts test, then arguably McDonald

would have been entrapped. This would be a disastrous blow to law enforcement. It would mean that they could never effectively initiate any investigation for violation of narcotic laws. Such a result would perpetuate and accelerate the growing problem of drug abuse in the nation. The adoption of the third theory would only operate to cause additional confusion. Because of the lack of clear standards, implicit in any balancing formula, law enforcement would never be certain as to whether an arrest is proper until after they make the arrest and it is adjudicated on the merits in the appellate courts. As such, the Court would be unable to direct the conduct of law enforcement on the streets at the time of the commission of the crime as it is presently able to do under the "origin of intent" test of *Sherman*.

Petitioner also proposes to the Court that the Fourth Amendment standards of Search and Seizure be applied to entrapment. Respondent fails to see the tenuous analogy between *Katz v. United States*, 389 U.S. 347 (1967) and *Terry v. Ohio*, 392 U.S. 1 (1968) and the present controversy over entrapment. Petitioner proposes that citizens have a fundamental right to unrestrictively engage in criminal conduct and that right is constitutionally protected. Any investigation, no matter how slight, conducted by government officials would be considered a breach of that right. Sale of narcotics should not be considered a basic right of privacy within the confines of one's home or apartment. Such a decision would be an unwarranted extension of the constitutional principles found in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Jacobellis v. Ohio*, 378 U.S. 184 (1964).

The Fourth Amendment concept of entrapment has been specifically rejected by the Federal courts in *United*

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States, ex rel. Hall v. Illinois, 329 F.2d 354 (7th Cir. 1964). Judge Hastings stated that entrapment is not a fundamental right embraced by the Fourteenth Amendment Due Process Clause. He rejected the attempt to analogize entrapment to the exclusionary rules concerning unlawful searches and seizures. The Court went on to say that:

> There is no showing here, and we believe there can be none, that the several states have not assiduously afforded an accused the unfettered protection of the defense of entrapment when the facts establish the coercive effect of the employment of the lawless enforcement of the law.

CONCLUSION

For these reasons a Writ of Certiorari should not be issued to review the judgment of the Supreme Court of Ohio.

Respectfully submitted,

STEPHAN M. GABALAC
Prosecuting Attorney
PATRICK W. SEMEGEN
Assistant Prosecuting Attorney
Counsel for Respondent

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